Supreme Court, U.S.
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IN THE OFFICE OF THE CLERK

# SUPREME COURT OF THE UNITED STATES

**National Funding, Et al**

**Petitioner**

**v.**

**Bank of New York**

**Respondent**

**On Petition For Writ Of Certiorari**
**To Connecticut Supreme Court**

## PETITION FOR WRIT OF CERTIORARI

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**Question Presented For Review**

Whether Connecticut General Statute Section 52-221(a) contains an Unconstitutional portion contrary to Article III of the United States Constitution, the provision stipulates.

> *In any hearing in damages upon default suffered or after demurer overruled, the defendant shall not be permitted to offer evidence to contradict any allegations in the plaintiff's complaint, except such as relate to the amount of damage, unless he has given notice to the plaintiff of his intention to contradict such allegations and of subject matter which he intents to contradict, nor shall the defendant be permitted to deny the right of the plaintiff to maintain the action, unless he has given written notice to the plaintiff of his intention to deny such right or to prove a matter of defense.*

The provision's portion "nor shall the defendant be permitted to deny the right of the plaintiff to maintain the action", preclude the defense of Plaintiff's lack standing to maintain the action, is contrary to Article III and this Court Decision in *Steel Co. v. Citizens for Better Environment*, 533 U.S. 83 (1998).

The alleged unconstitutional portion is the question presented, as applied in the instant action. While three relevant motions pending before the trial court; 1) motion to dismiss on

the ground of *res judicata*; 2) motion for reconsideration of motion to compel discovery, on the ground of Plaintiff lack standing pursuant to Article III; *Steel*, supra; and *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574; and 3) motion for summary judgment, the Judge's law Clerk not the court clerk entered the default for failure to comply with discovery. Petitioner cured the default and moved to open the default, the court denied. Petitioner filed notice of defenses within ten days after the court denied opening the default. At trial the Superior court precluded any defense for lack standing, *res judicata*, estoppel effect of the uniform commercial code, statute of limitations or any other defense except the amount of damages. The damages were the result of independent actions of third parties were not before the court and the court issued a judgment against Petitioner. Petitioner appealed to Connecticut Appellate Court who affirmed the judgment and cited that Petitioner has raised the issues of standing; statute of limitations; and *res judicata*, but did not discuss except the default. Petitioner applied for reconsideration upon the legal issues and the jurisdictional issues, on the ground of lack standing and cites Connecticut jurisdictional authorities of lack standing and this Court recent authority *Arbaugh v. Y & H Corp. d/b/a Moonlight Cafe*, 04-944 (January 11, 2006), the Appellate Court denied. Petitioner applied for certification from Connecticut Supreme Court and raised the jurisdictional and the standing issues and cited this Court authority, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, the Connecticut Supreme Court Denied review. Are the above proceedings deny due process?

**PARTIES TO THE PETITION**

1. Petitioner is Mostafa Reyad doing business as National Funding, et al, a sole proprietor, pro se.
2. Bank of New York, Trustee is the Repondent.
3. The Attorney General of the State of Connecticut is a Respondent pursuant to 28 U.S.C. 2403(b).

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1. Article III of the United States Constitution.
2. *Steel Co. v. Citizens for Better Environment*, 533 U.S. 83 (1998).
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5. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).
6. *Arizona v. California*, 530 U.S. 392 (2000).
7. *C.I.R. v. Sunnen*, 333 U.S. 591, 597 (1948).
8. *Nevada v. United States*, 463 U.S. 110, 128-30 (1983).
9. *Exchange Nat'l Bank of Chicago v. Touch Ross & Co.*, 544 F. 2d 1126, 1130-31 (2nd Cir. 1976).
10. *Sweater Bee by Banff Ltd. v. Manhattan Indus. Inc.*, 754 F. 2d, 457, 462 (2nd Cir. 1985).
11. Conn. Gen. Stat. *52-221(a).*
12. Conn. Gen. Stat. 52-221(b).
13. Conn. Gen. Stat. 42-110(g)(c).
14. Conn. Gen. Stat. 42-110(g)(f)
15. *Avon Meadow Condominium Associates, et al v. Bank of Boston Connecticut*, 50 Conn. App. 688, 699-700 (1998).
16. *DeBlasio v. Aetna Life and Casualty Co.* 186 Conn. 398, 441 A. 2d 838 (1982).
17. *Bill Butler Associates v. New England Savings Bank* 42 Conn. Supp. 198, 201 (1991).

## CITIATIONS OF OFFICIAL REPORTS

1. The Connecticut Superior Court, Judicial District of Waterbury, Complex Litigation Docket, *Bank of New York Trustee v. National Funding, et al*, case number X01-CV-00-0171525S, Memorandum of Decision Re: Hearing in Damages, dated January 21, 2005, Hon. B.J. Sheedy, Judge.

2. The Connecticut Appellate Court, *The Bank of New York Trustee v. National Funding et al*, case number AC 26195, (97 Conn. App. 133), Opinion by Hon. Mclachlan, Appellate Judge dated August 15, 2006.

3. The Connecticut Supreme Court, *The Bank of New York, Trustee v. National Funding et al*, Certificate number PSC-06-0153 dening petition of Mostafa Reyad dated October 10, 2006.

## STATEMENT PURSUANT 28 U.S.C. 2403 (B)

Petitioner has complied with 28 U.S.C. 2403(b), pursuant to this Court Rules, Rule 29 (c), the Attorney General of the State of Connecticut has been served with three copies of this Petition For Writ of Cirtiorari.

## STATEMENT OF JURISDICTION

This Court has the jurisdiction over the instant petition pursuant to Article III of the United States Constitution.

## STATEMENT OF THE CASE

Petitioner, Mostafa Reyad was a mortgage banker a sole proprietor doing business under the names, Federal Mortgage Company of Connecticut and National Funding. The former to originate mortgages from consumers, and the latter to originate loans from mortgage brokers. Petitioner's operation was the same under either name. Petitioner order credit report at the interview with the consumer either the consumer applied directly or referred by a mortgage broker, if the consumer is qualified, Petitioner will order the appraisal report, however, in rare instances, if the consumer has an appraisal report issued to another company, Petitioner has it accept it, verify its contents, e.g. verify the license of the appraiser and his or her insurance, verify the comparable properties listed on the report, and the date of sale of that comparables. Petitioner also verify the deposits of the consumer in banks and other financial institutions. Petitioner contacts the consumer's attorney to mail him the sales contract. Petitioner prepares the package of the above and overnight it to the wholesaler to underwrite it. The underwriter of the wholesaler will fax his conditions to buy the loan, upon satisfaction of the conditions the underwriter will order the funds to close. Thereafter, Petitioner will call the consumer's attorney to mail or deliver a protection letter from a recognized title insurance company insuring the attorney for the funds he will receive to close the transaction, the protection letter must be issued to the name of the wholesaler not the Petitioner. The consumer's attorney also will mail the title insurance policy and obtain a home-owner's insurance policy, naming the wholesaler.

On the date of closing the transaction, the wholesaler will wire the money to the closing attorney, the attorney will disburse according to the wholesaler's instructions, prepare the closing statement, and overnight all documents directly to the

wholesaler, even if the closing documents show the name of Petitioner, the Petitioner has to forward to the wholesaler a mortgage assignment prior to the closing and also has to assign the mortgage note to the wholesaler before delivery to the consumer's attorney. The Wholesaler record the assignment in the land records, and its service department collect the monthly payments. In any event, and because the wholesaler underwrites the loans, Petitioner assigns the mortgage note and the mortgage deed "WITHOUT RECOURSE" to the wholesaler. The stipulation of "without recourse" protect the Petitioner against any claim may happen in the future if the consumer was late in his monthly payments for any reason, e.g. consumer lost his job, divorce, death or any other reason.

Petitioner relevant to this action, entered into some correspondent agreements with some wholesalers, however, Petitioner never engaged in any agreement whatsoever with Bank of New York. On August 28, 1996 Petitioner entered into agreement with IndyMac, Inc. as a wholesaler, that agreement called "Seller Contract", and on December 6, 1996 entered into agreement with Warehouse Lending Corporation of America, "WLCA", the subsidiary of IndyMac, Inc., the latter agreement called the credit facility documents. Petitioner mail his packages to IndyMac, Inc. for underwriting, WLCA will fund the loan typical to the above demonstration.

On July 1998, American Mortgage LLC a Connecticut mortgage broker attempted to enter into agreement with IndyMac, Inc., and mailed to them a mortgage package. IndyMac, Inc. suspended American Mortgage LLC agreement, until the latter can change his license from mortgage broker to mortgage banker. IndyMac, Inc. advised American Mortgage to refer that package to National Funding. National Funding interviewed the applicant, Eugene Chimblo, a wealthy individual with a net worth of about 21 million dollar, and

possess an excellent credit score of 738 and his income exceeds sixty thousand dollar per month, applying to purchase the property at 993 lake Avenue, Greenwich, CT 06830, putting the amount of $ 962,500 as a down payments. National Funding received from Chimblo a copy of appraisal report prepared by Gary Olcha, a Connecticut insured licensed appraiser issued to American Mortgage LLC indicating that, the property owned by Gerald Hutter to refinance his property. National Funding reviewed the appraisal report and verified the accuracy of the informations listed on the appraisal report, which were completely accurate. National Funding obtained the sales contract from Chimblo's attorney, verified the amount of three million dollar cash in banks. Petitioner put all documents in a package and overnighted it to IndyMac, Inc. in Pasadena, California. On August 2, 1998 IndyMac, Inc. faxed to Petitioner two underwriting suspense, because IndyMac, Inc.'s underwriter, namely Roxanne Lerma of IndyMac team "A" decided to make the mortgage loan as two loans, i.e. first mortgage in the amount of $ 1,512,500 and second mortgage in the amount of $ 137,500. Ms. Lerma directed Petitioner to contact the appraiser Mr. Olcha to retype to reflect current purchase transaction, not refinance see Exhibit # 5 attached hereto. On the same exhibit Ms. Lerma added her conditions as follows: 1) Sr. management review, subject to additional conditions, modifications and pricing adjustments, upon receipt of all other suspense conditions; 2) Appraiser to include listing history of subject and provide the latest MLS printout of subject; 3) Appraiser to clarify adjustment to finished basement in light of fact the cost to construct was only $ 138K Breakdown for marble floors & inground pool/spa for $ 475K; 4) Internal appraisal review by IndyMac Appraiser, subject to additional conditions and modifications upon receipt of conditions 2,3 & 6 ; 5) Satisfactory Quality Control review completed by IndyMac. Prior to management review; and 6) Provide interior photos of subject and clear photos for comps.

Ms. Lerma added condition number 8 prior to Doc "Appraiser to provide retype to reflect current purchase transaction, not refinance. The underwriter conditioned New 2nd to record concurrently. See also Exhibit # 6 attached hereto, similar conditions. Within about 4 weeks, after all conditions were met, IndyMac, Inc. scheduled the closing on August 31, 1998. The first and the second mortgage closed. Petitioner assigned the mortgage notes, and the mortgage deeds to IndyMac, Inc. and its subsidiary WLCA "WITHOUT RECOURSE", see Exhibit # 3 & Exhibit # 4.

At the beginning of the year 2000, IndyMac, Inc. became more larger corporation, and the internet era facilitate consumers to apply directly to IndyMac, Inc., lessened the need for correspondents like Petitioner. Unfortunately, problems started and their lawyers inundated courts by their cases. On May 8, 2000 IndyMac, Inc. and its subsidiary WLCA who claimed that IndyMac Mortgage Holdings, Inc. doing business as Warehouse Lending Corporation of America initiated two actions against Petitioner and his wife as a guarantor, the first, *IndyMac, Inc. and IndyMac Mortgage Holdings, Inc. v. Mostafa Reyad and Wafa Reyad*, in the Federal District of Connecticut, case number 00-835, and the second under the same caption in the Federal District of New Jersey, case number 2000-2237.

The first and the second federal actions were for, inter alia, the same cause of action typical to the instant action, although it is different plaintiff's names. The plaintiff in the instant action is Bank of New York, Trustee who falsely claimed that the Chimblo loans originated for him, never provide evidence to support his claim, and never provide evidence of his ownership of the note. It appears to be that Bank of New York was able to change the name on the mortgage assignments from IndyMac to Bank of New York. Petitioner raised the defense that, Bank of New York is a stranger, however, Petition proceeds, as Bank of New York bought the Chimblo loans from IndyMac, Inc., accordingly Bank of New York is the privity of IndyMac, Inc.

The first action in the Federal District of Connecticut proceeded and the second action in the Federal District of New Jersey was put on an indefinite stay. The Connecticut action dismissed on August 10, 2001 all plaintiff's claims of IndyMac, Inc., including the two Chimblo's loans pursuant to Fed. R. Civ. P. Rule 12(b)(6). Petitioner was represented by an attorney for the instant action, who filed a motion to dismiss on the ground of *res judicata* on June 17, 2002 (Doc # 109.20). The attorney who represented Petitioner abandon the practice of law without notice to any entity including Petitioner. The said motion to dismiss, never ruled upon. On September 17, 2002 Bank of New York moved the Superior Court to add parties (Doc # 125), the court denied on the ground that discovery were overdue when the request for adjudication was filed, the court order was dated November 7, 2003, the order was never entered on the docket sheet. Bank of New York moved to enter default against Petitioner on December 3, 2003 (Doc # 154) for failure to respond to discovery request dated September 22, 2003, requested after the period of discovery

has expired as ordered by the court on November 7, 2003 setting the expiration of discovery date prior to September 17, 2002. Indeed, the case file does not have a certain date except the order of the court of November 7, 2003. The court *sua sponte* extended the discovery response to February 6, 2004. Petitioner filed his timely motion for reconsideration on January 27, 2004 (Doc # 161), requesting extention of time until ruling on the issues of Bank of New York standing, pursuant to this court authorities of *Ruhrgas* 526 U.S. 574 (1999), and *Steel Co.* 533 U.S. 83 (1998), and attached a printout of *Ruhrgas* case to Petitioner's motion. Petitioner also requested postponing the ruling upon discovery until the ruling upon summary judgment dated January 27, 2004 (Doc # 167). On May 6, 2004, the Superior Court judge law clerk, not the court clerk entered default against Petitioner, the default never entered on the docket sheet, accordingly, the court clerk did not enter the default as mandated by the Connecticut court rules of practice. On May 13, 2004 Petitioner moved to open the default after Petitioner complied with discovery response, the court scheduled a hearing on July 12, 2004 for Petitioner's motion to reopen the default. Bank of New York admitted that he received the response, and claimed that response was minimal and did not state any detail. In fact the discovery was equivalent to request to disclose properties and no more. On the hearing Petitioner stated to the court that he has a meritorious defense, however, the court cut Petitioner off at least five times not to continue and denied to hear any defense, in fact the court stated that *Ruhrgas* and *Steel, Co.* is not helping Petitioner because it is not Connecticut authority. The Superior Court Judge was yelling for almost one full hour and Petitioner was scared if he talks, the judge may put him in contempt, and may put him to prison if he will be in contempt, and may put him in prison if he will explain his meritorious defense, after the judge deny Petitioner to defend himself. At the middle and again at the end of the hearing, the judge

ordered judgment on the liability for default and applied Conn. Gen. Stat. Sec. 52-221(a), and precluded Petitioner to defend himself in any factual or legal matter except the amount of damages. Petitioner filed with the court within the ten days mandated by Connecticut Practice Book Sec. 17-35. Notice of defenses dated July 20, 2004 (Doc # 186.05) raising the jurisdictional standing issues, res judicata, statute of limitations and the estoppel effect of the drawn of "without recourse" pursuant to Connecticut Commercial Code. The Court considered it as untimely, and explained that the ten days to file notice of defenses starts from the entry of default by the clerk not from the date of ruling on motion to reopen the default.

At the hearing on damages on October 26, 2004, the Petitioner was denied to defend himself from anything except the amount of damages, and even denied to call witness as evidence to Petitioner's statement that Bank of New York is a stranger, the court accepted only the entry of one exhibit, that exhibit is attached hereto as exhibit # 5, # 6 and # 7 . The first two exhibits is the evidence that Roxanne Lerma was the underwriter of IndyMac, Inc. who purchased the two loans after review by senior management team of the wholesaler of IndyMac, Inc., reviewed by IndyMac, Inc.'s internal appraiser, and IndyMac, Inc. conducted quality control, the third exhibit is the evidence that damages were caused by the failure of Mr. Chimblo in making the monthly mortgage payments in the amount of $ 574,753.76. The Trial court denied review the evidence even after acknowledged it. In sum it was unfair and Unconstitutional trial to preclude any defense including standing, res judicata and the estoppel defense of the commercial code and statute of limitations.

The trial court issued its decision on January 21, 2005 see exhibit # 6 attached hereto. The court stipulated that this

action is one of several actions concerning the same transaction, and listed another two actions are very relevant to this Petition. The first action is *Bank of New York v. Eugene Chimblo*, et al (Docket # X01-CV99-0163131). Mr. Chimblo is the wealthy individual who applied with Petitioner for the two loans. The *Chimblo* court entered a deficiency judgment in the amount of $ 448,726.50 against Chimblo, see exhibit # 7 Mr. Chimblo was delinquent in the amount of $ 574,753.76 for monthly payments. The superior court also stipulated that the parties stipulated on the record the plaintiff would not seek to enforce the deficiency judgment against Chimblo or his heirs; exhibit # 1 FN 3. It means that the judgment has been satisfied upon that entry pursuant of Conn. Practice Book Sec. 5-6. The second action is *Bank of New York v. Gary Olcha* (Docket # CV 00-0375788), *Olcha's* court issued a judgment against Mr. Olcha in the amount of $ 526,875 plus costs. Mr. Olcha who did the appraisal report for the two Chimblo loans.

The trial court decision issued judgment against the Petitioner for the exact amount of deficiency judgment which was satisfied by the entry between Bank of New York and Chimblo, on the ground that Petitioner neglected review the appraisal report of Gary Olcha, the court erroneously adopted Bank of New York allegations and the trial court neglected the fact that the underwriter of that two loans was IndyMac, Inc. and its underwriter Roxanne Lerma as shown herein on exhibit # 5 & exhibit # 6. The court established negligence on the well accurately presented informations requested by IndyMac, Inc. and was obtained by Petitioner according to the directions of IndyMac, Inc. the provider of the funds. Petitioner never misrepresented any fact, and infact all the informations on the appraisal report was undisputedly very accurate. More importantly, Mr. Hughes who is the expert witness never attack the accuracy of the informations, but attacked only the way Mr. Olcha performed his appraisal report. Thus, Bank of New York

allegations of misrepresentation of any one never existed. IndyMac, Inc. the provider of the funds reviewed it by their senior management team and their own appraiser and purchased it. Indeed, Bank of New York misrepresented their case. Moreover, Bank of New York neglected his legal duties to its shareholders by waiving the collection of deficiency judgment from Mr. Chimblo who was delinquent in making his payments and caused the bank monetary substantial damages. The Attorney General should comment on this violation and may initiate corruption charges against Bank of New York. It is also impossible to believe that justice will agree that Bank of New York to waive the collection of deficiency judgment of a wealthy individual who borrowed the money and to obtain judgment against Petitioner who disclosed honestly and professionally every information available to him to the provider of the funds and furtherly agree without limitations to Bank of New York false allegations of independent actions of third parties, none of them before the court.

**ARGUMENT**

**A.**

Bank of New York lacks standing pursuant to Article III of the United States Constitution, see *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61.

> *Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury-in-fact" – an invasion of a legally-protected interest which is (a) concrete and particularized, see id., at 756; Warth v. Seldin, 422 U.S. 490, 508 (1972); Sierra Club v. Morton, 405 U.S. 727,740-741, n. 16 (1972); 1 and (b) "actual or imminent, not 'conjectural' or 'hypothetical', "'Whitmore, supra, at 155 (quoting Los Angeles v.*

*Lyons, 461 U.S. 95, 102 (1983). Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court". Simon v. Eastern K. Welfare [504 U.S. 555,561] Rights Organization, 426 U.S. 26, 41-42 (1976). Third it must be "likely", as opposed to merely "speculative", that the injury will be "redressed by a favorable decision". Id., at 38,43.*

*The party invoking federal jurisdiction bears the burden of establishing these elements. See FW/PBS, Inc. v. Dallas, 493 U.S. 215,231 (1990); Warth, supra, at 508. Since they are not mere pleading requirements, but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation. See Lujan v. National Wildlife Federation, 497 U.S. 871, 883-889 (1990); Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 114-115, and n. 31 (1979); Simon, supra, at 45, n. 25; Warth, supra, at 527, and n. 6 (Brennen, J., dissenting). At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss, we "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." National Wildlife Federation, supra, at 889. In response to a summary judgment motion, however, the plaintiff can no longer rest on such "mere allegations", but must "set forth" by affidavit or other evidence "specific facts", Fed. Rule*

*Civ. Proc. 56 (e), which for purposes of the summary judgment motion will be taken to be true. And at the Final stage, those facts (if controverted) must be "supported adequately by the evidence adduced at trial." Gladstone, supra, at 115, n. 31.*

In this action, Bank of New York demonstrated his injury-in-fact, particularized in loss of collecting monthly payments due from Mr. Chimblo, and failed in its traceability. There is no relation between Petitioner and Mr. Chimblo, other than the application for mortgage loan. The underwriter was IndyMac, Inc. made their decision to buy the loans and verified all the pertinent informations by their senior management, conducted quality control, and reviewed by their own appraiser. If Mr. Hughes criticizes Gary Olcha, he should criticize IndyMac Inc.'s own appraiser, and there is no relation between Petitioner and Gary Olcha. Appraiser opinions appraiser, similar to doctor can opinion another doctor, but doctor cannot make opinion against pharmacist. Banker cannot make opinion against appraiser; this is to explain why IndyMac, Inc.'s underwriter Roxanne Lerma, conditioned the review of IndyMac, Inc.'s own appraiser as a condition to buy the Chimblo loans. Mr. Hughes whom the court relied on his testimony did not attack the informations provided by Mr. Olcha, but he did not agree with his methodology in performing his opinion, Mr. Olcha is not a party to this action, and was not in the court to respond to Mr. Hughes. Accordingly, it is impossible to be fair traceability from the appraiser to the Petitioner, and its fails the third element of redressability pursuant to *Lujan* supra.

Bank of New York and the trial court opinion is contrary to *Lujan*, either the cause of action is a deficiency

judgment, or defective appraisal report, it is the result of the independent actions of Mr. Chimblo or Mr. Olcha. It is merely speculative that the injury can be redressed by a favorable decision. The entire trial rested on the appraisal report performed by Mr. Olcha, and the methodology of Mr. Olcha opinion, it may be a proximate cause, but it cannot be the direct cause reliefing Mr. Chimblo who failed to make the monthly payments in the amount of $ 574,753.76, and if justice determined that the appraisal report is the proximate cause or even the direct cause, that, will not relief IndyMac, Inc.'s underwriter Roxanne Lerma, its senior management team, and specifically IndyMac, Inc.'s owned appraiser. None of these persons were before the court. Accordingly, Bank of New York lacks standing pursuant to Article III.

Bank of New York, also lacks standing to sue pursuant to the estoppel effect of the inclusion of the drawn stipulation "without recourse" pursuant to Connecticut Commercial Code, see Conn. Gen. Stat. Sec. 42a-3-415(b).

> *If an endorser states that it is made "without recourse" or otherwise disclaims liability of the endorser, the endorser is not liable under section (a) to pay the instrument.*

The stipulation of Conn. Gen. Stat. Sec. 52-221(a), and its rigid application by the trial court precluded Petitioner to offer any defense or evidence is Un-Constitutional, it deny Petitioner the equal protection of law granted by the Fourteenth Amendment of United States Constitution. See exhibit # 8 & # 9 attached hereto, the two loans of Mr. Chimblo were endorsed by "without recourse", accordingly, Bank of New York lacks statuary standing.

Moreover, Bank of New York lacks standing to sue under the Connecticut Unfair Trade Practices Act "CUTPA". Connecticut CUTPA shares in some respect with the federal "RICO". RICO standing order requires a plaintiff in a civil RICO case submit a RICO case statement within 20 days of filing the compliant. Connecticut CUTPA has a similar provision see Conn. Gen. Stat. Sec. 42-110 (g)(c).

> *Upon the commencement of any action brought under subsection (a) of this action, the plaintiff shall mail a copy of the complaint to the Attorney General and the Commissioner of Consumer Protection, and upon the entry of any judgment or decree to the Attorney General and the Commissioner of Consumer Protection.*

The trial court records shows that Bank of New York has mailed the complaint on August 8, 2004 (Doc # 191), after Petitioner has raised the issue, i.e. more than four (4) years of filing the complaint, and see Conn. Gen. Stat. Sec. 42-110(g)(f).

> *An action under this section may not be brought more than three years after the occurrence of a violation of this chapter.*

Thus, Bank of New York fails to comply with CUTPA provisions during the period of the jurisdictional three years statute of limitations. Neither Connecticut Supreme Court, nor the Appellate Court discussed 42-110(g)(c) in any case, however, *see Bill Butler Associates v. New England Savings Bank* 42 Conn. Supp. 198, 201 (1991)(Nevertheless General Statutes Section 42-110 (g)(c) mandates that a private plaintiff mail a copy of his complaint and judgment to the Attorney General) Id. and *see Avon Meadow Condominium Associates,*

*et al v. Bank of Boston Connecticut*, 50 Conn. App. 688, 699-700 (1998) (Accordingly, we hold that the three year limitation contained in 42-110 (g)(f) is jurisdictional and was properly applied by the trial court to the third count), accordingly, Bank of New York lacks statuary standing to sue, after the expiration of the jurisdictional statute of limitations of CUTPA claims for his failure to timely compy by Sec. 42-110(g)(c) as a matter of law. All these defenses were well pleaded in the Superior Court and the Appellate Court, and both Courts passed over these issues.

**B.**

Bank of New York entire complaint is barred by the application of *res judicata*. The trial court erred in evaluating the dismissal of the same cause of action ordered by the Federal District of Connecticut, case number 00-835 (D. Conn.) Dated August 10, 2001, dismissing IndyMac, Inc. entire complaint including the two (2) Chimblo loans under the Rule 12(b)(6). The trial court erred in considering the dismissal not binding and has no *res judicata* effect, reasoning that "No forum selection clause is here at issue", it means the trial court wants to relitigate the issue anew. Petitioner well pleaded that defense prior to and at trial and cited; *Exchange Nat'l Bank of Chicago v. Touch Ross & Co.*, 544 F. 2d 1126, 1130-31 (2nd Cir. 1976) (Friendly, J.)("[J]udgment under Rule 12(b)(6) are on the merits, with res judicata effect . . . . "); *Sweater Bee by Banoff, Ltd v. Manhattan Indus. Inc.*, 754 F. 2d, 457, 462 (2nd Cir. 1985). See *Nevada v. United States*, 463 U.S. 110, 128-30 (requiring courts to first decide whether the "same cause of action" is being sued upon); *Arizona v. California* 530 U.S. 392 (2000)(This result is fully consistent with the polices

underlying *res judicata*: it is not based solely on the defendant's interest in avoiding the burdens of twice defending a suit, but is also based on the avoidance of unnecessary judicial waste); *C.I.R. v. Sunnen*, 333 U.S. 591,597 (1948) (The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever absent fraud or some other factor invalidating the judgment), the Appellate Court also erred by citing that Petitioner raised the defense of *res judicata*, but did not discuss the issue, see, exhibit # 7 attached hereto.

C.

The trial court as well as the Appellate Court exceeded their jurisdiction, and vested in themselves certain jurisdiction and power, specifically that jurisdiction is limited only to Connecticut Supreme Court. Petitioner challenges the Constitutionality of Conn. Gen. Stat. Sec. 52-221(a), however, *see* the stipulation of Sec. 52-221(b).

> *The judges of the Supreme court shall make such rules as to the manner of filing such notices and as to the form thereof as they deem advisable.*

Indeed, Petitioner does not challenge Sec. 52-221(b), it is the law empowers only Connecticut Supreme Court Judges to put the rules of "notice of defenses", see the judgment of the Appellate Court exhibit # 2 FN 9.

> *The defendant cites DeBlasio v. Aetna Life &Casualty Co., 186 Conn. 398, 441 A. 2d 838*

*(1982), in support of his position. Although our Supreme Court concluded that the notice of defenses in that case met the requirements of Practice Book Sec. 17-34, the issue of the timelines of the notice pursuant to Practice Book Sec. 17-35 was not addressed.*

Thus, the Appellate Court exceeded its jurisdiction, by not requesting a certificate from Connecticut Supreme Court relating to the timelines of filing notice of defenses, and ruled an issue which it has no jurisdiction to rule upon, as a matter of law. Petitioner followed the *DeBlasio* court, and raised it prior to and at trial and on the appeal. Connecticut Supreme Court denied review, making the provision of law as open-ended. Litigants followed the law as written or explained. Petitioner does not believe that this Court ever requested a certification from a State Supreme Court, but this Court certainly, has the power to reverse the judgment.

The Petitioner, pro se
Mostafa Reyad

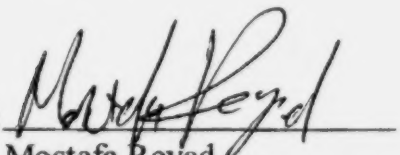
By: 

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**EXHIBIT # 1**

NO. X01 CV-00-0171525 S : SUPERIOR COURT
JUDICIAL DISTRICT OF WATERBURY
BANK OF NEW YORK, TRUSTEE :
:
V.
:
NATIONAL FUNDING, ET AL : JANUARY 21, 2005
COMPLEX LITIGATION DOCKET

**MEMORANDUM OF DECISION RE: HEARING IN DAMAGES**

This is one of several actions concerning the same transaction transferred to this complex litigation docket for management and trial. Plaintiff, Bank of New York as Trustee, here sued and sought damages as against Mostafa Reyad, a mortgage lender licensed in this state, and several mortgage lending companies of which he is sole proprietor and by which he does business under the trade names of National Funding, National Funding Mortgage Broker, and Mostafa Reyad & Companies (here, "Defendants"). The plaintiff did not proceed against the Mortgage People LLC, withdrew against Federal Mortgage of Connecticut, on February 27, 2004, and withdrew as against Douglas Milan, Esq., at trial. Actions brought against Joseph Grassi, Jr., Vice-President of the various Defendants, and Vincent Liberti, Esq., were dismissed by this court on July 29, 2004. The

case was tried as against these Defendants as a hearing in damages on October 26, 2004, the Court having entered a default against them on April 27, 2004, for their failure to comply with discovery [FN 1]. The Defendants proceeded pro se, their prior counsel having in the interim resigned from the practice of law.

In a decision rendered after trial in a related matter captioned *Bank of New York v. Eugene Chimblo, et al* (Docket # X01-CV99-0163131), Hodgson, J. entered a judgment of strict foreclosure as against Chimblo and one Gerhard Hutter in favor of the plaintiff with regard to the subject property at 993 Lake Avenue in Greenwich, Connecticut. This court took judicial notice of that Memorandum of Decision dated May 14, 2001 (Exh. 4 here). Chimblo there stipulated to entry of judgment and further stipulated the amount due on two notes securing two mortgages as of April 2, 2001, was, as regards the fist note, the principal amount of $ 1,507,317.40 with interest of $ 279,063.26 and, with regard to the second note, the principal amount of $ 137,127.74 with interest of $ 29,522.95 [FN 2].

Thereafter, on June 16, 2003, after hearing in a Motion for Deficiency Judgment, the court, Hodgson, J. found the value of the property on February 1, 2002 (the date plaintiff acquired title as a result of the May 14, 2001, judgment), to be $ 1,650,000, the value appraised by Dwight Hughes, a licensed appraiser, who testified before Judge Hodgson on June 16, 2003, and before this court in the instant matter on October 26, 2004. Finding the judgment debt to be $ 1,840,482.39, interest of $ 109,486.00 on that debt pre-foreclosure and $ 38,245.06

post foreclosure, legal fees and costs of $ 59,369.00, and an appraiser's fee of $ 850.00, Judge Hodgson found the deficiency to be $ 448,726.50 and entered judgment in that amount [FN 3]. Finally, in another related action brought in the Judicial District of Fairfield at Bridgeport, captioned *Bank of New York v. Gary Olcha* [FN4], Docket No. # CV-00-0375788, the court, Stevens J., after a hearing in damages, took judicial notice of Judge Hodgson's entry of strict foreclosure and entry of deficiency judgment [FN5], and found damages as against the appraiser were properly measured, under *Advanced Financial Services, Inc. v. Associated Appraisal Services*, 79 Conn. App. 22, 34 (2003), to be the amount of the debt owed the plaintiff minus the fair market value of the property on the date title vested in the plaintiff (2/1/02) or $ 476,580 – to which he added interest (to the dated of the plaintiff's submission) of $ 50,295.00 for a total award of $ 526,875.00 plus costs [FN6].

In her decision of May 14, 2001, Hodgson J. found the following facts which are material to this court's determination and of which this court has taken judicial notice. In 1997, Gerhard Hutter and his wife Nance owned the four bedroom house on more than four acres in Greenwich. Nance Hutter had filed for bankruptcy and the bankruptcy argued to the bankruptcy court the value of the house was $ 875,000. The house was put up for auction and that amount and that amount was bid. Gerhard Hutter, as joint owner, had the opportunity to purchase the property by matching the bid amount but he had not the funds to do that. The Hutters told Douglas Milan, Esq. of their interest in the property

and their financial problems and Milan, knowing the Hutters had obtained an appraisal indicating the property was valued at an amount significantly in excess of the bid amount, put the Hutters in touch with Milan's elderly neighbor and client, Eugene Chimblo. Chimblo and Hutter agreed to a complicated arrangement by which Chimblo would loan Hutter the $ 875,000 necessary to clear the house from the bankruptcy proceedings, at which point Hutter could either pay off the loan from Chimblo (which Hutter could not do) or Chimblo and Hutter enter into a further agreement to renovate and sell the home with the two dividing the net proceeds. They agreed Chimblo would borrow $ 1.65 million which would clear Hutter's indebtedness to Chimblo for $ 875,000, permit Chimblo to pay $ 550,000 of the anticipated sale proceeds in advance to Hutter, and finance the renovations and mortgage payments until the house was sold. Hutter believed the property was worth $ 2.75 million based upon an appraisal completed by Gary Olcha at that amount. Hutter and Chimblo 's agreement provided the purchase price of the property was $ 2.75 million and that the house would be listed at and sold for at least that amount. Exh. 4, p. 6.

Judge Hodgson specifically found the "parties were well aware that by structuring the transaction as the purchase by Chimblo of a property for $ 2.75 million, Chimblo was more likely to obtain financing in the amount of $ 1.65 million, which would appear to be only sixty percent of value." **Id**. Milan, as Chimblo's attorney, was referred to National Funding as a source for the $ 1.65 million loan. National Funding, a trade name of Mostafa Reyad, licensed in this state in August of 1998 as a mortgage lender, did not loan its own funds but

obtained money from other sources to write loans which National Funding then assigned to the provider of the funds. The agreement between Chimblo and the Hutters was executed at Mostafa Reyad's place of business in Stamford on August 31,1998, the date and location set for the closing of the $ 1.65 million loan from National Funding to Chimblo [FN7]. Hutter signed a warranty deed conveying title in fee simple to Eugene Chimblo. Olcha's $ 2.75 million appraisal, originally completed for Hutter was, "re-certified" to National Funding at the request of Grassi who had indicated the appraisal could be used for the mortgage loan transaction if the appraisal were recertified to National Funding. Exh. 1, Para. 6. Grassi has admitted he was employed by National Funding at the time (Exh. 3, response to interrogatory # 3). The defendants admitted, in response to Paragraph 8 of the First Count of the Revised Complaint of July 23, 2002, that Grassi was at all relevant times an employee of the Defendants and was acting within the course and scope of his employment. See Answer dated August 16, 2002, filed by the Defendants' former attorney when he represented all of these Defendants. Reyad never later amended that response. Chimblo executed the two notes for $ 1,512,500 and $ 137,500 secured by the two mortgages in favor of National Funding and he defaulted on them having made only minimal payments. Hodgson, J. found he also signed a consent to assignment and an acknowledgment a servicer might be utilized with regard to the loans. Exh. 4, p. 7. The plaintiff held the notes and mortgages pursuant to a securitization agreement [FN8] with Indy Mac Bank, the servicer of the two mortgages.

Following this hearing in damages, the parties submitted post-trial memoranda of law [FN9]. The court has examined the exhibits, reviewed the trial testimony, carefully read the trial briefs and had closely read all of the transcripts of hearings earlier held – to include a transcript of the trial before Hodgson, J. (more about which will later here be said) and the memoranda of decisions of which she has taken judicial notice.

**NEGLIGENCE**

The plaintiff relies on Paragraphs 18 (g) and (h) of the Revised Complaint on July 23, 2002. Paragraph 18(g) asserts, "The National Funding Defendants, acting by and through Joseph Grassi, Jr. and/or Mostafa Reyad, acted negligently and/or carelessly in the preparation and closing of the Notes I and II and Mortgages I and II in that the true loan to value ratio of the transactions . . . violated lending criteria of the National Funding Defendants, Mostafa Reyad, the provider of the funds, Federal Home Loan Mortgage Corporation and Federal National Mortgage Association." The negligence asserted in Paragraph18(h) is that "the defendant failed to provide accurate and correct information for the closing and sale of the loans, (sic) when it was reasonably foreseeable (sic) that Notes I and II and Mortgages I and II would be sold."

A finding of negligence is predicated on the existence of a duty. See e.g., *Catz v. Rubenstein*, 201 Conn. 39, 44 (1986). "The existence of the duty is a question of law . . . " *Murillo v. Seymour Ambulance Assn, Inc.*, 264 Conn. 474, 479 (2003). In *Murillo*, supra, our Supreme Court enunciated a test for the existence of

a legal duty. That test entails:

> (1) a determination of whether an ordinary person "in the defendant's position, knowing what the defendant knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result, and (2) a determination, on the basis of a public policy analysis, of whether the defendant's responsibility for its negligent conduct should extend to the particular consequences or particular plaintiff in the case . . . The first part of the test invokes the question of foreseeability, and the second part invokes the question of policy." (Citation and internal quotation marks omitted). 264 Conn., at 479.

The Defendants' commitment letter of August 18, 1998 (Exh. 7), indicates "60% CLTV" – or loan to value ratio for loan transaction. It was issued by National Funding, is on National Funding stationery, and is signed by Joseph R. Grassi, Jr., as Vice President of National Funding. Exh. 3 confirms that employment and Mostafa Reyad, the sole proprietor of the business, had testified to Grassi's employment by him at an earlier hearing and had admitted to his employment of Grassi in his former lawyer's response to the governing complaint. There is therefore sufficient evidence to warrant the finding of an agency relationship between Reyad and National Funding and Grassi. The "value" of the property was said by Gary Olcha, Hutter's appraiser, to be $ 2.75 million.

Exh.1, paragraph 6, provides Attorney Milan, Chimblo's lawyer, was advised by Grassi of the need for an appraisal and that Olcha's report could be used for the loan transaction if that appraisal were recertified to National Funding and that was in fact accomplished. Similarly, Exh. 8, the Uniform Underwriting Transmittal Summary, shows a loan to value ration of 60% ("LTV-55.000%; Total LTV-60.000%"), lists the appraised value at $ 2,750,000 (same as the sale price) based on Olcha's appraisal, identifies Grassi as both the "underwriter" and "contact person" and National Funding as the "seller", and was signed by Grassi as National Funding's agent on July 28, 1998. The flaws in the Olcha appraisal were attested to by the plaintiff's expert, Dwight Hughes, a certified real estate appraiser who appraised the subject property four times and reviewed Olcha's appraisal. Hughes was aware the property was listed for sale in 1997 for $ 2.1 million but did not sell but that Olcha never stated that in his appraisal and he testified that omission violated the Uniform Standards of Property Appraisal Practices which required real estate appraisers to refer to multiple listings of a subject property in arriving at an opinion of value. Tr., 10/26/04, pp. 23-4. In fact, there was a place on the appraisal form for such listings. Id., at p. 24. Thus, the 1998 Olcha appraisal for $ 2.75 million was a value $ 650,000 above the price for which it was listed in 1997, a price at which it did not sell. Hughes' appraisal of the property's value - $ 1.250 million – was based on data provided him from the multiple listing service and his comparing of the subject property to three other Greenwich properties which sold during the period 1/98 – 6/25/98 and were of similar size and amenities and on similar acreage (sales comparison approach) [FN10]. Exh. 5. He did another drive-by

appraisal to determine the property value on 2/1/02 (when title vested in the plaintiff) and found its value was $ 1.650 million. Exh. 6. He also then walked the property, spoke to the listing agent, and researched comparable sales. Hughes also testified Olcha's appraisal deviated from the standard of care employed by real estate appraisers in that Olcha chose dissimilar properties as comparables – specifically, properties with close to 7,000 sq. ft. of living space when the subject property was 3,934 sq. ft. of gross living area, properties that had six and one-half bathrooms when the subject property had two and one-half bathrooms, etc. Hughes' testimony was that, based upon his appraisal of the property in June of 1998, the loan to Chimblo actually had a loan to value ratio of 120%, that that ratio was a deviation from the standards applicable to loan transactions, and that, though he had appraised over two hundred fifty properties, he was aware of no loans in which the loan to value ratio was in excess of 100%. Tr., p. 41. Finally, Hughes testified an appraiser's opinion of the value of real property was critical in arriving at a loan to value ratio for the purpose of loan appraisals and that an appraiser in such situations serves as the "eyes of the banks or the lender." Tr. P. 36 [FN11].

Grassi was made aware the subject property sold at auction shortly prior to these loan transactions for $ 875,000. Exh. 1. While evidence of sale price at auction is not determinative of a property's true value, such knowledge should at least have made Grassi wary of Olcha's appraised value of $ 2.75 million - more than three times the auction price. Grassi's

response, however, was to suggest to Attorney Milan that Olcha's June of 1998 appraisal could be used to obtain approval of Chimblo's loan if that appraisal were re-certified to National Funding. Grassi was Reyad's and National Funding's agent and employee vis-a-vis these loan transactions. As a licensed mortgage lender, Reyad knew or should have known of the need to accurately represent the property's appraised value and the loan to value ratio. He knew the loans were to be assigned to this plaintiff. Despite repeated references to this court that this plaintiff was a "stranger" to him, the evidence before Judge Hodgson "was undisputed that Mostafa Reyad authorized his employee, Ayeshah Iliah, to sign the assignment of the mortgage on his behalf, doing business as National Funding adopting her act as his own." Exh. 4, p. 11. That finding is confirmed on examination of Reyad's trial testimony before Judge Hodgson on April 11, 2001. With reference to Ms. Iliah's authorization to assign the mortgages to Bank of New York, Reyad testified, "I issued an instruction for her to do that." Tr., p. 24. Later, he testified her authority to make the assignment was "in the normal course of business." Tr., p. 59. Thus, the three elements required to show the existence of an agency were established - specifically (1) a manifestation by the principal the agent will act for him: (2) acceptance by the agent of the undertaking; and (3) an understanding between the parties the principal will be in control of the undertaking. *Gateway v. DiNoia*, 232 Conn.,239-40(1995). A principal is generally liable for the authorized acts of his agent. 1 Restatement (Second), Agency sec. 140, p. 349 (1958). The existence of agency is a question of fact to be determined by the trier of fact. *Newtown Associates v. Northeast Structures, Inc.*, 15

Conn. App. 633, 637 (1988). Iliah's acts were undertaken with the express authority of Reyad as principal of National Funding. Grassi's acts were preformed, if not with Reyad's express authority, with apparent authority. "[A]n agent who has apparent authority can bind his principal, especially as to parties who act in good faith." *Hall Brooke Foundation, Inc. v. City of Norwalk*, 58 Conn. App. 340, 344 (2000). "Apparent authority is that semblance of authority which a principal, through his own acts or inadvertences causes or allows third persons to believe his agent possesses. . . . Consequently, apparent authority is to be determined, not by the agent's own acts, but by the acts of the agent's principal." (Citations omitted; internal quotation marks omitted; emphasis added.) *Tomlinson v. Board of Education*, 226 Conn. 704, 734 (1993). Acting with authority conferred upon them by these Defendants, Grassi's and Iliah's acts became the acts of Reyad and these Defendants for which acts they was answerable. Grassi misrepresentations, whether intentional of negligent, became these Defendants misrepresentations. It was clearly foreseeable this plaintiff would suffer the harm it did (The loan was sold for $ 1.4 million.) because the collateral for the loans was substantially less than the amount of the debt. Public policy favors the imposition of tort liability on mortgage brokers who do not act with honesty and who make these kinds of misrepresentations in the mortgage loan origination process because brokers have reason to anticipate an undersecured loan will cause loss to a lender who acquires that loan. Mortgage brokers ought not be encouraged to close such loans without respect for the truth seeking process in order that they might be paid.

Public policy requires the disclosure of all relevant facts, the exchange of accurate appraisals, and true representations of the value of collateral from loans obtained. Grassi and Olcha were joint participants in the obtaining of the appraisal upon which the loan was approved in the sense that they are both liable to the plaintiff for the harm to it. Restatement (Second) Torts, Sections 886A. p. 338, Comment B. That Olcha has already been adjudged liable in another forum is no impediment to the imposition of liability upon these Defendants for their negligent misconduct in creating the same harm.

Contrary to the plaintiff's urging re the measure of damages to be awarded, this court believes the appropriate measure is the amount of the deficiency judgment - which Hodgson, J. Found to be $ 448,726.50 [FN 12]. This court awards compensatory damages in that amount. The plaintiff has also requested the court to award interest under Connecticut General Statute Section 37-3a. The applicable statute is Connecticut General Statutes Section 37-3b which makes the recovery of interest mandatory rather than discretionary and at the rate of ten percent a year "computed from the date that is twenty days after the date of judgment . . ." Our Appellate Court has concluded that a party seeking an award of post-judgment interest must file a post-trial motion because the award can be determined only after judgment has been rendered." Bower v. D'Onfro, 45 Conn. App. 543,549 (1997). It will therefore be necessary for the plaintiff to file a motion for post-judgment interest and provide the court the appropriate calculation as per

section 37-3b(a) and (b).

**CUTPA.**

The plaintiff relies upon the same two allegations earlier asserted to here state a claim under the Connecticut Unfair Trade Practices Act (CUTPA) - specifically that the inclusion of incorrect information regarding loan to value ratio and appraisal value as stated in Exhibits 7 and 8 violate Connecticut General Statutes section 42-110a et seq. The Act is aimed at eliminating or discouraging "unfair or deceptive acts or practices" in the conduct of any trade or commerce. Connecticut General Statutes Section 42-110b (a). The standard for determining whether an act or practice constitutes a CUTPA violation is known as the "cigarette rule". Under that test, the criteria for determining when a practice is unfair: (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise - in other words, it is within at least the penumbra of some common law, statutory, other established concept of unfairness: (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers, [competitors or other business persons] . . . . . All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three." *Willow Springs Condominium Assn., Inc. v. Seventh BRT Development Corp.*, 245 Conn. 1, 43, citing *to Cheshire Mortgage Service, Inc. v. Montes*, 223 Conn. 80, 105-06

(1992). To justify a finding of unfairness, the injury must be a) substantial; b) outweighed by any countervailing benefits to consumers or competitors that the practice produces; and c) an injury that consumers themselves could not reasonably have avoided. *Williams Ford, Inc. v. Hartford Courant Co.*, 232 Conn. 559, 592 (1995). An act or practice is deceptive if three conditions are met. First, there must be a representation, omission,or other practice likely to mislead consumers, Second, consumers must interpret the message reasonably under the circumstances. Third, the misleading representation, omission, or practice must be material - that is, likely to affect consumer decisions or conduct. *Southington Savings Bank v. Rodgers*, 40 Conn. App. 23, 28 (1995). A violation of CUTPA may be established "by showing a practice amounting to violation of public policy . . . Furthermore, a party need not prove an intent to deceive to prevail under CUTPA." (Citations omitted; internal quotation marks omitted.) *Normand Josef Enterprises, Inc. v. Conn. National Banking*, 230 Conn. 486, 522-23 (1994). The standard under CUTPA is lower than for fraud. Id., at 523. Whether a practice is unfair and thus violated CUTPA is an issue of fact. *DeMotses v. Leonard Schwartz Nissan, Inc.*, 22 Conn. App. 464, 466 (1990). A single set is sufficient to establish a CUTPA violation. *Johnson Electric Co. v. Salce Contracting Assoc., Inc.*, 72 Conn. App. 342,353 (2002). The statute is a remedial statute and is to be interpreted in favor of recovery. *Id.*

The Connecticut Supreme Court has addressed the scope of CUTPA liability by misrepresentation in *Hinchliffe v. American Motors Corp.*, 184 Conn. 607

(1981). "The CUTPA plaintiff need not prove reliance or that the representation became part of the basis of the bargain." Id., at 617. Furthermore, CUTPA imposes no requirement of a consumer relationship. *Larsen Chelsey Realty Co., v. Larsen*, 232 Conn. 480, 495-96 (1995). In *McLaughlin Ford, Motor Co.*, 192 Conn. 550, 567 (1984), the Court concluded a competitor or other business person could maintain a CUTPA cause of action without showing consumer injury.

Considering the totality of the circumstances, this court concludes the Defendants' misrepresentations were material and deceptive. Exhibits 7 and 8 establish deceit. Representing the loan to value ratio to be sixty percent when in fact it was, as Hughes' testified, one hundred twenty percent is clearly material to a lender whose need is to ensure a given transaction is appropriately secured. The lender had a right to rely upon the representations made by these Defendants. For reasons earlier stated, the conduct at issue here violates public policy. Mortgage brokers ought not be encouraged to engage in deceptive acts and practices which cause foreseeable harm of the type suffered by this plaintiff in order that the broker close a transaction so as to be paid. It undermines banking principles and mortgage industry standards to permit the level of dishonesty here demonstrated and the cost to society - whether measured by the potential for bank losses (perhaps even failure),increased consumer costs, or loss of consumer confidence in mortgage lenders/brokers - requires the statutory scheme be broadly construed so as to discourage these

unscrupulously deceptive practices and to encourage accuracy and honestly in order that the national problem of mortgage fraud be addressed.

Both to establish the significant misconduct of these defendants and to underscore the need to punish those like they who sacrifice truth for personal gain, punitive damages are awarded under Connecticut General Statute's section 42-110 (a) in an amount equal to actual damages.

To the damages awarded for negligent misconduct ($448,726.50) is added an additional $ 448,726.50 for a total award of $ 897,453.00 plus whatever interest may later be awarded under the negligence claim and statutory costs.

**DEFENDANTS' CLAIMS**

The Defendants submitted a timely trial memorandum dated 11/12/04 and an untimely Reply to the plaintiff's post-hearing memorandum on November 18, 2004. Nevertheless, the court here briefly addresses the arguments raised by those pleadings.

As earlier stated, the Defendants have claimed they are not liable to the plaintiff because a "stranger" to the plaintiff - which this court presumes means only that Reyad had no personal dealings with Bank of New York. That is of no significance since the trade name companies - of which Reyad is sole proprietor - clearly did. He authorized the loan assignments to the plaintiff and he is legally liable to the plaintiff by

application of agency principles with regard to Iliah's and Grassi's conduct. Thus, Reyad's statement that he "never has any power of decision making" (11/12/04 memorandum, p. 8) is unpersuasive as is his statement that he - a mortgage lender/broker - was not involved in a "trade" (and thus he argues he is not liable under CUTPA). *Id.*, at p. 10.

The Defendants' frequent turnabout positions are confusing and frustrate the court's comprehension of the arguments. Though the defendants have earlier inundated the court with memorandum urging dismissal of this matter based upon a federal court action entitled IndyMac Holdings, Inc., et al. v. Mostafa Reyad, et al., U.S. Dist. Of Conn., Civil Action No. 3:00CV835 (CFD) [FN 13], here he describes that federal action as "not related to this action in any respect". Reply memorandum, p. 1. Yet, on p. 18 of his 11/12/04 memorandum, he states, "This action is a duplicate of exact part (sic) of the Federal action." Reyad also argues the federal action is res judicata and this action should be dismissed as a matter of law. Id., at p. 4. For reasons this court has articulated in earlier Rulings, there is no res judicata and this court has jurisdiction.

Defendants argue they are not liable because "Plaintiff presented to this Court a forged assignment of mortgage without recourse." 11/24/04 memorandum, p. 13. Not only was there not a scintilla of evidence regarding a "forgery" but Reyad's argument ignores his testimony before Hodgson, J. admitting he authorized Iliah to assign the mortgages and notes to this plaintiff.

Inconsistently, he argues he endorsed the mortgage assignment and note "without recourse" and therefore he cannot be held liable to any holder of the mortgage or note. Id., p. 12. At the conclusion of the hearing in damages before this court, Reyad made the same argument. Trial transcript of 10/26/04, p. 104. Defendant offered Exh. A - which the court permitted - as evidence of the same. Exh. A was not the assignment but rather a Notice of Underwriting Review from IndyMac to Reyad. More to the point, it evidences no endorsement by Reyad and, not
surprisingly given the character of the document, does not anywhere contain the language "without recourse". The court is without any evidence to prompt consideration of the Defendant's argument.

Reyad attacked the appraisal(s) of Hughes because they were retroactive drive-by appraisals. Hughes established such appraisals were common in the industry and that his appraisals were also based upon comparable sales, the property's listing history, conversations with prior listing agents, review of MLS documents, and inspections of photographs of the property.

The Defendants argue this court wrongly deprived them of the right to file special defenses and wrongly deprived them of the right to present evidence. P.B. Section 17-34(a) provides.

> *In any hearing in damages upon default suffered or after demurer overruled, the defendant shall not be permitted to offer evidence to contradict any allegations in the plaintiff's complaint, except such as*

*relate to the amount of damage, unless he has given notice to the plaintiff of his intention to contradict such allegations and of subject matter which he intents to contradict, nor shall the defendant be permitted to deny the right of the plaintiff to maintain the action, unless he has given written notice to the plaintiff of his intention to deny such right or to prove a matter of defense.*

Under sub-section (b), the notice requirement is made applicable to all "other claims for affirmative relief." P.B. Section 17-35(a) provides the notices called for in section 17-34(a) "shall be given in the manner provided in Sections 10-12 through 10-14, the original with proof of service being filed with the clerk." Section 17-35(b) provides, "In all actions in which there may be a hearing in damages, notice of defenses must be filed within ten days after notice from the clerk that a default has been entered." Under P.B. section 17-37, the notice shall specify the allegations of the complaint to be controverter and only those allegations should be specified which are intended to be controverted by proof and only those allegations should be specified which are intended to controverted by proof. Thus, section 17-34, calls for providing of *two* notices - one to the plaintiff of the intention to contradict specific allegations of the complaint and the second being written notice to the plaintiff of the intention to deny plaintiff's right to maintain

the action and to prove any matter of defense. That two notices are required by section 17-34 is made clear by the use of the word "notices" in section 17-35(a).

Examination of the chronology of pleadings reveals the inaccuracy of Reyad's representation the court defaulted the Defendants on July 12, 2004. In fact, the default was granted on May 6, 2004 (#171). Defendants filed a Motion to Re-Open the default (#183.25), which motion, while dated 2/11/04, was not filed with the court until 5/13/04. The motion was denied at the conclusion of argument on July 12, 2004. and it was that denial - not the granting of the default - that entered on July 12, 2004. It was not until July 21, 2004, that the Defendants filed a "Notice of Defense" (#186.05). Even had the two Notices requires by P.B. section 17-34 been filed, the Notice of Defenses was untimely filed.

Finally, the Defendants argue that, with regard to the CUTPA claim, the applicable statute of limitations bars the claim. C.G.S. section 42-110g(f) provides for a three year statute of limitations. The misconduct occurred in 1998; this suit having been brought in the year 2000, the statute had not yet expired.

The Defendants' claims are both untimely and unpersuasive.

Judgment enters in favor of the plaintiff in the gross amount of $ 897,453.00 plus costs and whatever interest may be awarded.

/s/
B.J.Sheedy

FN 1. Discovery responses from the Defendants had been due January 5, 2004. This court permitted the Defendants additional time to February 6, 2004, for compliance and advised the Defendants a default would enter against them failing such compliance. The Defendants filed no compliance and default entered. In fact, no compliance had yet been made when on or about March 11, 2004, the Defendants filed a Motion to Re-Open. The court, after a hearing held on July 12, 2004, found no good cause shown as required by Practice Book Section 17-42 and denied that motion.

FN 2. The court also awarded attorney fees in the amount of $ 5,771.73 and statutory costs.

FN 3. The parties stipulated on the record the plaintiff would not seek to enforce the deficiency judgment against Chimblo or his heirs.

FN 4. Olcha was an appraiser - more about whom will later here be said.

FN 5. Exhibit 9 here, pp. 16-17.

FN 6. Id., at p. 21.

FN 7. Vincent Liberti, Esq., represented National Funding at the closing of the two loans of Chimblo.

FN 8. Pooling and Servicing Agreement Series 1999 D on August 31, 1998.

FN 9. The Defendants' Reply brief was submitted after the time agreed to by the parties.

FN 10. Reyad's cross-examination of Hughes focused did a retroactive drive-by appraisal – that is, he viewed the property from the exterior in 2000 and, using data researched and above described, determined the value of the property on 6/25/98. Hughes testified credibly that such approaches were frequently employed in the industry and his approach was based on comparable sales. Cross-examination was not effective.

FN 11. The defendants never disclosed a liability expert. Even had this matter proceeded as a fully contested trial on the merits, Hughes' testimony would have remained unrefuted.

FN 12. Ruling on Plaintiff's Motion for Deficiency Judgment, June 16, 2003, p. 2; see also *First Federal Savings & Loan Association of Rochester v. Charter Appraisal Co.*, 247 Conn. 597, 610 (1999).

FN 13. Reyad has inaccurately and repeatedly represented Droney, J. dismissed the case before him. Reyad's motion to dismiss for lack of subject matter jurisdiction was denied. 8/10/01 Ruling, p. 35. All that was granted was Reyad's motion to dismiss based upon a forum selection clause in the parties' contract – which the court treated as a 12(b)(6) motion. Id. No forum selection clause is here at issue.

**EXHIBIT # 2**

THE BANK OF NEW YORK, TRUSTEE V. NATIONAL FUNDING ET AL.

(AC 26195)

McLachlan, Lavine and Pellegrino, Js.

*Argued May 2-officially released August 15, 2006*

(Appeal from Superior Court, judicial district of Waterbury, Complex Litigation Docket, Sheedy, J.) *Mostafa Reyad*, pro se, the appellant (defendant). *Geoffrey K. Milne*, for the appellee (plaintiff).

Opinion

McLACHLAN, J. The defendant Mostafa Reyad [FN 1] appeals from the judgment of the trial court, following a hearing in damages, awarding the plaintiff, The Bank of New York, trustee, the sum of $897,453, plus interest and costs. The defendant claims that the court improperly (1) determined that the plaintiff had standing to bring this action, (2) deprived him of his due process rights by not allowing him to present defenses as to liability and (3) concluded that he was negligent as alleged in the complaint. We affirm the judgment of the trial court.

This case is one of several actions, arising out of the same transaction, which had been transferred to the complex litigation docket in the judicial district of Waterbury for management and trial. The defendant, who was licensed as a mortgage lender in Connecticut in August, 1998, operated several business under various trade names and obtained money from other sources to write loans that were then assigned to the providers of those funds. On August 31, 1998,

Eugene Chimblo borrowed $ 1.65 million from National Funding, one of the defendant's companies, and executed two notes and two mortgages to secure those notes in favor of National Funding on property at 993 Lake Avenue in Greenwich. The subject notes and mortgages were assigned to the plaintiff. Chimblo defaulted after a few payments, and the plaintiff sought a strict foreclosure of the first mortgage and money damages in connection with the second mortgage. The court in that action granted the relief requested. The value of the property foreclosed was significantly less than the $ 1.65 million loaned to Chimblo.

Prior to the closing of the transaction, the defendant issued a loan commitment to Chimblo that provided for a loan to value ratio of 60 percent. The underwriting transmittal summary indicated that the value of the Greenwich property was $ 2.75 million and gave the appraised value as $ 2.75 million, and also provided for a loan to value ratio of 60 percent. That appraisal had been prepared for Gerhard Hutter, the seller of the Greenwich property to Chimblo, in connection with a different proposed transaction. The defendant authorized it to be "re-certified" to National Lending instead of requiring an independent appraisal.

The present action was brought against the defendant and his companies for negligence and violation of the Connecticut Unfair Trade Practices Act (CUTPA) [FN2] in connection with the preparation and closing of the two notes and mortgages executed by Chimblo and assigned to the plaintiff. It was alleged, inter alia, that the closing statements did not reflect accurately the terms of the actual transaction, that the actual loan to value ratio of the transaction was inconsistent with the underwriting guidelines and violated the lending criteria of the provider of the funds, and that the

defendant failed to provide accurate information for the closing and sale of the loans. The defendant filed an answer without special defenses.

In September, 2003, the plaintiff served discovery requests on the defendant. On December 3, 2003, the plaintiff filed a motion to compel responses, which was granted by the court on January 5, 2004, requiring compliance by February 6, 2004. On February 9, 2004, the plaintiff moved to default the defendant for failure to comply with the court-ordered discovery, which was granted by the court on May 6, 2004. The defendant moved to open the default on May 13, 2004. The court denied that motion at a hearing held on July 12, 2004, concluding that the defendant did not show "good cause" as required by Practice Book sec. 17-42 [FN3]. At that time, the court explained to the defendant, who was and is proceeding pro se, that a hearing in damages would be scheduled at which time he could dispute the amount of the damages but not contest liability [FN4]. The defendant then filed a notice of defenses on July 20, 2004..

The matter proceeded to a hearing in damages on October 26, 2004. The plaintiff presented witnesses and submitted exhibits. The defendant cross-examined the plaintiff's witnesses and submitted one exhibit, a notice of underwriting review. The defendant called one witness to testify on the issue of damages, but the court would not permit him to call witnesses to testify on the issue of liability.

The court issued its memorandum of decision on January 21, 2005, rendering judgment in favor of the plaintiff in the amount of $897,453, plus interest and costs. In that decision, the court concluded that the defendant's actions

constituted negligence and caused harm to plaintiff, as alleged in the complaint. Further, the court concluded that the defendant made material and deceptive misrepresentations and awarded CUTPA damages. With respect to the defendant's claims, the court found them to be "untimely and unpersuasive," and specifically stated that his notice of defenses was not timely filed. Nevertheless, the court briefly addressed those defenses in its decision before rendering judgment in favor of the plaintiff. This appeal followed.

None of the defendant's issues on appeal address the award of damages [FN5]. The defendant attempts to raise issues that had been raised in various motions prior to the hearing in damages, which already had been addressed by the court, or raises issues directed to liability. At least one of his issues on appeal, challenging the "viability" of the plaintiff's operative complaint, was not raised at the trial court level and is raised for the first time before this court [FN6]. Because the defendant was defaulted and did not file a timely notice of defenses, none of the issues raised on appeal are properly before us.

The defendant does not dispute that the default entered against him on May 6, 2004. In his motion to open the default, the defendant did not claim that he failed to receive notice of that default, nor did he state that there was good cause for opening the default. The court denied his motion on July 12, 2004. After that denial, the defendant filed a notice of defenses on July 20, 2004. No previous notice of defenses had been filed, and it is clear from the record that the defendant had not filed special defenses to the operative complaint.

"A default admits the material facts that constitute a

cause of action . . . *and entry of default, when appropriately made, conclusively determines the liability of a defendant* . . . . If the allegations of the plaintiff's complaint are sufficient on their face to make out a valid claim for the relief requested, the plaintiff, on the entry of a default against the defendant, need not offer evidence to support those allegations . . . . Therefore, the only issue before the court following a default is the damages . . . . A plaintiff ordinarily is entitled to at least nominal damages following an entry of default against a defendant in a legal action . . . .

"In an action at law, the rule is that the entry of a default operates as a confession by the defaulted defendant of the truth of the material facts alleged in the complaint which are essential to entitle the plaintiff to some of the relief prayed. It is not the equivalent of an admission of all of the facts pleaded. The limit of its effect is to preclude the defaulted defendant from making any further defense and to permit the entry of a judgment against him on the theory that he has admitted such of the facts alleged in the complaint as are essential to such a judgment. It does not follow that the plaintiff is entitled to a judgment for the full amount of the relief claimed. The plaintiff must still prove how much of the judgment prayed for in the complaint he is entitled to receive." (Emphasis in original; internal quotation marks omitted.) *Catalina v. Nicolelli*, 90 Conn. App. 219, 221, 876 A.2d 588 (2005).

"[T]he entry of default [however] does not preclude the defendant from raising defense at the hearing in damages. See Practice Book sec. 17-34 [FN7]. If timely written notice is furnished to the plaintiff, the defendant may offer evidence contradicting any allegation of the complaint. [Practice Book sec. 17-34]. The defendant may also challenge the right of the

plaintiff to maintain the action or prove any matter of defense. [Practice Book sec. 17-34]. If the defendant appears in the action and furnishes the required notice, the subsequent hearing in damages takes on the nature of a supplemental trial involving the determination of questions of law and fact, and the determination of the damages to be assessed after such trial." (Internal quotation makes omitted.) *Monaco v. Turbomotive, Inc.*, 68 Conn. App. 61, 63, 789 A.2d 1099 (2002).

To be timely, notice must be given within the time period provided in Practice
Book sec. 17-35 [FN8]. Section 17-35 (b) clearly provides that a "notice of defenses must be filed within ten days after notice from the clerk to defendant that a default has been entered." The court's docket sheets indicate that notice was sent May 6, 2004. The defendant's notice of defenses was file July 20, 2004, well past the requisite ten day period. The defendant argues that the ten day period runs from the time of the court's denial of this motion to open default, which was July 12, 2004.

The defendant's argument is not persuasive, given the plain language of Practice Book sec. 17-35. "The rules of statutory construction apply with equal force to Practice Book rules." (Internal quotation marks omitted.) *Whalen v. Ives*, 37 Conn. App. 7, 11, 654 A. 2d 798, cert. Denied, 233 Conn. 905, 657 A. 2d 645 (1995). "A cardinal rule of statute construction is that where the words of a statute [or rule] are plain and unambiguous the intent of the [drafters] in enacting the statute [or rule] is to be derived from the words used . . . . Where the court is provided with a clearly written rule, it need look no further for interpretive guidance." (Internal quotation marks

omitted.) *Schiappa v. Ferrero*, 61 Conn. App. 876, 882, 767 A. 2d 785 (2001). "We are constrained to read a statute as written.... And we may not read into clearly expressed legislation provisions which do not find expression in its words . . . ." (Internal quotation makes omitted.) *Urbanowicz v. Planning & Zoning Commission*, 87 Conn. App. 277, 289, 865 A.2d 474 (2005).

According to Practice Book sec. 17-35 (b), the defendant was required to file a notice of defenses within ten days after notice of default from the clerk. His interpretation, i.e., that he had ten days from the denial of his motion to open default,
simply is not supported by the plain language of the rule. Our case law is in accord [FN9]. In *Whalen v. Ives*, supra, 37 Conn. App. 19-20, the court specifically concluded that the ten day period for filing a notice of defenses began to run from the notice of the default and and had expired before the defendant filed his motion to set aside the default. "A party who allows the ten day period from the notice of a default to expire without filing a notice of defenses does so at his peril. The defendant elected to appeal to the court's discretion pursuant to [Practice Book sec. 17-42] without filing a timely notice of defenses as a precaution in the event the court denied his motion to set aside the default." *Whalen v. Ives*, supra, 20.

Here, the defendant filed a motion to open the default, but did not file a notice of defenses within ten days after the notice of the entry of the default. Significantly, in claiming that his due process rights have been violated, he has not challenged the propriety of the court's decision in denying the motion to open the default for failure to demonstrate good cause. Instead of claiming that the court abused its discretion in denying that motion, he argues that he timely filed the notice

and improperly was precluded from proving those defenses at the hearing in damages. The denial of the motion to open the default, being unchallenged, must be deemed to be proper. The defendant, therefore, cannot prevail on his claim that the court improperly precluded him from presenting his defenses to liability when he failed to file a timely notice of defense pursuant to Practice Book sec. 17-35 [FN10]. See *Whalen v. Ives*, supra, 37 Conn. App. 20.

The judgment is affirmed.

In this opinion the other judges concurred.

FN 1. This action was brought against National Funding; National Funding Mortgage Banker; The Mortgage People, LLC; Federal Mortgage Company of Connecticut, Inc., Mostafa Reyad & Companies; Mostafa Reyad; Joseph R. Grassi, Jr.; Vincent A. Liberti, Jr.; and Douglas Milan. The plaintiff did not proceed against The Mortgage People, LLC, withdrew its complaint as to Federal Mortgage of Connecticut, Inc., prior to trial and withdrew its complaint as to Milan at trial. The court dismissed the action as to Grassi and Liberti prior to trial. The court rendered judgment against the remaining defendants on January 21, 2005. Mostafa Reyad is the only defendant to appeal from that judgment, and he is referred to as the defendant in this opinion.

FN 2. General Statutes sec. 42-110a et seq.

FN 3. Practice Book sec. 17-42 provides in relevant part: "A motion to set aside a default where no judgment has been rendered may be granted by the judicial authority for good cause shown upon such terms as it may impose . . . ."

FN 4. The court stated: "So, there will be a hearing in damages at which time you can dispute the damages, but not the liability because you've been defaulted. You may offer evidence that goes to damages, and if you have special defenses that you have already filed and already pleaded, you can argue those at the time of the hearing in damages if they are relevant to damages. If they are relevant to liability, they are inappropriate."

FN 5. The defendant's six issues are stated as follows: "1. Plaintiff had no viable complaint . . . . . 2. The [t]rial [c]ourt denied [d]efendant due process. . . . . 3. Plaintiff lacks standing . . . . . 4. Plaintiff's claims are precluded by res judicata application . . . . 5. Plaintiff's CUTPA claims are voided . . . . 6. The trial court miscalculated negligence." Even given the latitude normally afforded pro se litigants; *Wasilewski v. Machuga*, 92 Conn. App. 341, 342, 885 A. 2d 216 (2005); a thorough review of the claims themselves apart from the defendant's characterization or statement of the claims reveals that none of those claims are cognizable as proper defenses on the issue of damages.

FN 6. "[W]e will not decide an appeal on issue that was not raised before the trial court . . . . To review claims articulated for the first time on appeal and not raised before the trial court would be nothing more than a trial by ambuscade of the trial judge." (Internal quotation marks omitted.) *McCann Real Equities Series XXII, LLC. V. David McDermott Chevrolet, Inc.*, 93 Conn. App. 486, 527, 890 A. 2d 140, cert. Denied, 277 Conn. 928, 895 A. 2d 798 (2006),

FN 7. Practice Book sec. 17-34 (a) provides: "In any hearing in damages upon default, the defendant shall not be permitted to offer evidence to contradict any allegations

in the plaintiff's complaint, except such as relate to the amount of damages, unless notice had been given to the plaintiff of the intention to contradict such allegations and of the subject matter which the defendant intends to contradict, nor shall the defendant be permitted to deny the right of the plaintiff to maintain such action, nor shall the defendant be permitted to prove any matter of defense, unless written notice has been given to the plaintiff of the intention to deny such right or to prove such matter of defense."

FN 8. Practice Book sec. 17-35 provides: "(a) The notices requires by Section 17-34 shall be given in the manner provided in Sections 10-12 through 10-14, the original with proof of service being filed with the clerk.
"(b) In all actions in which there may be a hearing in damages, notice of defenses must be filed within ten days after notice from the clerk to the defendant that a default has been entered."

FN 9. The defendant cites *DeBlasio v. Aetna Life & Caualty Co.*, 186 Conn. 398, 441 A. 2d 838 (1982), in support of his position. Although our Supreme Court concluded that the notice of defenses in that case met the requirements of Practice Book sec. 17-34, the issue of the timeliness of the notice pursuant to Practice Book sec. 17-35 was not addressed.

FN 10. Nevertheless, the court addressed the defendant's defenses in its memorandum of decision filed January 21, 2005, although it was not necessary to do so. The analysis was thoughtful and concise, and this court will not undertake a separate review of those issues

**EXHIBIT # 3**

**APPELLATE COURT**
**STATE OF CONNECTICUT**

AC 26195

BANK OF NEW YORK

V.

NATIONAL FUNDING ET AL.

SEPTEMBER 6, 2006

**ORDER**

THE MOTION OF THE DEFENDANT-APPELLANT, FILED AUGUST 17, 2006, FOR RECONSIDERATION EN BANC, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY **ORDERED** DENIED.

BY THE COURT,

L. JEANNE DULLEA

ASSISTANT CLERK-APPELLATE

NOTICE SENT: SEPTEMBER 7, 2006

**EXHIBIT # 4**

**SUPREME COURT**

**STATE OF CONNECTICUT**

NO. PSC-06-0153

The Bank of New York, Trustee

v.

National Funding et al.

**ORDER ON PETITION FOR CERTIFICATION TO APPEAL**

On consideration of the petition by the defendant Mostafa Reyad for certification to appeal from the Appellate Court (97 Conn. App. 133 [AC 26195]), it is hereby ordered that said petition be, and the same is hereby denied.

Vertefeuille, J., did not participate in the consideration or decision of this petition for certification.

BY THE COURT,

ALAN M. GANNUSCIO
ASSISTANT CLERK-APPELLATE

Dated: 10/10/2006

**EXHIBIT # 5**

INDYMAC INC.
Notice of Underwriting Review IndyMac Prime Division
IndyMac Loan Number: 389386

UNDERWRITING STATUS: Suspended
Date: August 2, 1998 Product Line: IndyMac Prime
To: Mostafa Reyad Borrower(s): Eugene Chimblo
Attn: Sherif Reyad Property: 993 Lake Avenue
FAX#: (203) 316-4021 Greenwich, CT 06831
Phone: (203) 425-3350
Seller Number: 2108 Seller Loan Number: 993 Lake
TERMS
Loan Amount: $ 1,512,500.00 Purpose: Purchase
Loan Product: Fixed 30
Appraisal Value: $ 2,750,000.00 Documentation: Reduce Doc
Occupancy: Investment
Sale Price: $ 2,750,000.00 Property Type: Single Family Residence Loan Term: 360 months LTV: 55.00
Maximum Rate: 10.825 Doc Exp. Date: N/A
Exception #: 0 Lien Position: 1st Special Feature:(none)
Debt Ratio: 32 195 MI: Not required

Decision Credit Score/Product Credit Level: FICO-TRW 738 Level: N/A LTV/Product Max LTV: 5.00%/0.00% N/A
Debt to Income Ratio: 32.20% N/A
>2>30 day late mtg/rent pmts: No N/A
Final Credit Score/Price Credit Level: N/A Level: N/A

Conditions:
The following specific conditions must be satisfied as indicated by the codes described below. In addition, all guidelines set forth in the Seller Guide or applicable Master Commitment must also be satisfied prior funding/purchase.

**EXHIBIT # 5**

Condition Type: UW Suspense

1.Sr. management review, subject to additional conds, modification and pricing adjustments Upon reciept of all other suspense conds.

2. Appraiser to include listing history of subject and provide the lastest MLS printout of subject

3. Appraiser to clairfy $ 250K adjustment for finished basement in light of fact the cost of construct was only $ 138K. Breakout costs for marble floors pool/spa for $ 475k

4. Internal appraisal review by IndyMac Appraiser

5. Satifisfactory Quality Control review completed by IndyMac Prior to management review

6. Provide interior photos and clear of comps

Condition Type: Prior To Doc

8. Appraiser to provide retype of reflect current purchase transaction, not ref.

Condition Type: Closing

7. New 2nd to record concurrently

Additional Commitments:

A copy of this Notice must accompany the conditions when submitted and each conditions when must be numbered to correspond with the numbers above. All Underwriting Suspense conditions, if any, must be submitted together, at one time. All closing Prior To Documents or Prior To Funding conditions, if any, must be submitted together at one time. If any condition within these categories is required to be an original, all remaining conditions within the category must be originals and faxed copies are not acceptable. Conditions submitted individually will not be reviewed and an additional fee will be charged.

**EXHIBIT # 5**

IndyMac reserves the right to modify this approval or to declare it null and void if any representations made in the application are incorrect or incomplete or if there is any adverse change in the Borrower's credit, outstanding obligations, or employment, or in the value or condition of the property securing the loan prior to purchase.
All approvals for purchase are subject to final review of any underwriting contingencies and the closing package by IndyMac and Affiliates at time of submission for purchase.

IndyMac Team: A
IndyMac Underwriter: Roxanne Lerma
Phone Number: (800) 838-8305
Fax Number: (626) 440-7895

END OF NOTICE

Exhibit # 6

INDYMAC INC.
Notice of Underwriting Review IndyMac Prime Division
IndyMac Loan Number: 389345

UNDERWRITING STATUS: Suspended
Date: August 2, 1998 Product Line: IndyMac Prime
To: Mostafa Reyad Borrower(s): Eugene Chimblo
Attn: Sherif Reyad Property: 993 Lake Avenue
FAX#: (203) 316-4021 Greenwich, CT 06831
Phone: (203) 425-3350
Seller Number: 2108 Seller Loan Number: 993 Lake
TERMS
Loan Amount: $ 137,500.00 Purpose: Purchase
Loan Product: 30/15
Appraisal Value: $ 2,750,000.00 Documentation: Reduce Doc
Occupancy: Investment
Sale Price: $ 2,750,000.00 Property Type: Single Family Residence Loan Term: 360 months LTV: 55.00
Maximum Rate: 10.825 Doc Exp. Date: N/A
Exception #: 0 Lien Position: 2nd Special Feature:(none)
Debt Ratio: 32 195 MI: Not required

Decision Credit Score/Product Credit Level: FICO-TRW 738 Level: N/A LTV/Product Max LTV: 5.00%/0.00% N/A
Debt to Income Ratio: 32.20% N/A
>2>30 day late mtg/rent pmts: No N/A
Final Credit Score/Price Credit Level: N/A Level: N/A

Conditions:
The following specific conditions must be satisfied as indicated by the codes described below. In addition, all guidelines set forth in the Seller Guide or applicable Master Commitment must also be satisfied prior funding/purchase.

Condition Type: UW Suspense
4. Internal appraisal review by IndyMac Appraiser.
Subject to additional conds & modifications. Upon receipt of all property suspense conds as listed on 389385
6. Satisfactory Quality Control review completed by IndyMac
7. Sr. Management review. Subject to additional conds, modifications and pricing adjustments As required for 1st TD

Condition Type: Prior To Doc
5. Retype of appraisal to show as current purchase transaction

Condition Type: Closing
1. Credit report, Income and assert documentation may be dated no earlier than 120 days (180 for new construction) from the date of the Note. The appraisal may be dated no earlier than 120 days from the date of the Note
2. Verbal Verfication of Employment (See section 2250 of the Seller Guide for details)
3. To record concurrently with new 1st # 389386

Additional Commitments: NOTE: FILE WILL NOT BE ISSUED CLEAR APPROVAL, UNTIL 1ST IS APPROVED BY MANAGEMENT

A copy of this Notice must accompany the conditions when submitted and each conditions when must be numbered to correspond with the numbers above. All Underwriting Suspense conditions, if any, must be submitted together, at one time. All closing Prior To Documents or Prior To Funding conditions, if any, must be submitted together at one time. If any condition within these categories is required to be an original, all remaining conditions within the category must be originals and faxed copies are not acceptable. Conditions submitted individually will not be reviewed and an additional

fee will be charged.

IndyMac reserves the right to modify this approval or to declare it null and void if any representations made in the application are incorrect or incomplete or if there is any adverse change in the Borrower's credit, outstanding obligations, or employment, or in the value or condition of the property securing the loan prior to purchase.
All approvals for purchase are subject to final review of any underwriting contingencies and the closing package by IndyMac and Affiliates at time of submission for purchase.

IndyMac Team: A
IndyMac Underwriter: Roxanne Lerma
Phone Number: (800) 838-8305
Fax Number: (626) 440-7895

END OF NOTICE

Exhibit # 7

IndyMac Bank

August 1, 2002

Via 2nd day UPS #

E937760296426163

Mostafa Reyad
DBA: Federal Mortgage Company of CT/2108
777 Summer Street
Stanford, CT 06901

RE: **IndyMac Request for Actual Loss proceeds**
**IndyMac No. 389386/Chomblo**

Dear Mr. Reyad,

Attached please find Actual Loss Reconciliations for the above reference loans. As indicated on these reconciliations a net loss has been realized on each loan. Please remit the amount of $ 788,820.94 by August 14, 2002.

**Please note that additional expenses may have been incurred by IndyMac and/or Servicer but not quoted at this time. If this is the case, a supplemental billing will follow.**

The funds should be remitted via wire transfer to the following account:

Bank of America
ABA# 121-000-358 Account# 12354-25373
For credit to account of: IndyMac Bank, Property Liquidation Clearing Account

Reference S/S: 2108 IndyMac # 389386

In addition, please notify me, at (626) 535-5261, prior to the funds being remitted.

Thank you for your assistance. Should you have any questions regarding this matter please feel free to contact me.

Sincerely,

/S/

Paulette Mendoza
Repurchase Analyst
155 North Lake Avenue
Pasadena, California 91101
Telephone: 626-535-5555
www.indymacbank.com

**EXHIBIT # 8**

**National Funding**
800 Summer Street, Suite 305
Stamford, CT 06901

**BK3390PG0201**

**Assignment of Mortgage 1923**
Loan # 389386

For value received, National Funding, located at 800 Summer Street, Suite 305, Stamford, CT 06901, assigns the mortgage and any evidence of obligation secured thereby, **WITHOUT RECOURSE** to:
The Bank of New York Trustee under the Pooling and Servicing Agreement Series
1999-D at 101 Barclay Street, New York, NY 10286 Corp. Trust - MBS

Name of Mortgagor: EUGENE J. CHIMBLO

Street Address: 993 LAKE AVENUE

City: GREENWICH State: CT ZipCode: 06831

Date of Mortgage: 8/31/98

Legal Description: See Schedule "A" attached hereto and made part hereof.

**In Witness**
The undersigned has executed the following on the date shown below.

Date Executed: 8/31/98

Name of Mortgage: **National Funding**
Street Address: **800 Summer Street, Suite 305**
City: **Stamford** State: **CT** Zip Code: **06901**

Witness By:
X _____/S/_____ By:
_____/S/_____
MARION MILLER
AYESHAH ILAH, VP

X _____/S/_____
TOM AKRASS

**Notarization**

**Notary Seal**

State of: Connecticut Notary
Public Name: James J. Sabia

County of: Fairfield Notary Public Signature:
___/S/_____

My Commission Expires: 02/28/00
In and for: Fairfield County

Exhibit # 9

**National Funding**
800 Summer Street, Suite 305
Stamford, CT 06901

**Assignment of Mortgage**
Loan # 389345

**BK3372PG0200**

For value received, National Funding, located at 800 Summer Street, Suite 305, Stamford, CT 06901, assigns the mortgage and any evidence of obligation secured thereby, **WITHOUT RECOURSE** to:

Name of Mortgagor: EUGENE J. CHIMBLO

Street Address: 993 LAKE AVENUE

City: GREENWICH State: CT Zip Code: 06831

Date of Mortgage: 8/31/98

Legal Description: See Schedule "A" attached hereto and made part hereof.
**BK 3143**
**PG 82**

**In Witness**

The undersigned has executed the following on the date shown below.

The Bank of New York
Date Executed: 8/31/98

Trustee under the Pooling and Servicing Agreement Series
Name of Mortgage: **National Funding** 1999
at 101 Barclay Street
Street Address: **800 Summer Street, Suite 305** New
York, NY 10286
City: **Stamford** State: **CT** Zip Code: **06901**
Corp. Trust MBS

Witness By:

X _____/S/_____ By:
_____/S/_____
MARION MILLER
AYESHAH ILAH, VP

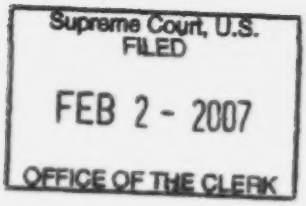
X _____/S/_____
TOM AKRASS
Notary Seal

**Notarization**

State of: Connecticut _____ **Notary Public**
Name: James J. Sabia

County of: Fairfield _____ Notary Public Signature:
_____/S/_____

My Commission Expires: 02/28/00
In and for: Fairfield County




# UNITED STATES SUPREME COURT

**06-921**

**MOSTAFA REYAD,**
**PETITIONER**

**V.**

**BANK OF NEW YORK, TRUSTEE,**
**RESPONDENT**

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

BY GEOFFREY MILNE
HUNT LEIBERT
50 WESTON STREET
HARTFORD, CT 06120
860-240-9140

## QUESTION PRESENTED FOR REVIEW

Respondent states that the question presented for review by the Petitioner regarding the constitutionality of CGS 52-221(a) was never raised in the trial court and cannot form the basis of the Petition.

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Weil v. Miller, 185 Conn. 495, 501-502 (Conn. 1981).....9

**CITATIONS OF REPORTS**

Bank of New York v. National Funding 97 Conn. App. 133 (2006) and underlying trial court opinion, unreported.

## BASIS FOR JURISDICTION

Respondent contends that there is no basis for jurisdiction because no federal question has been raised and there has been no compliance with Rule 10. Under Rule 10, review of a case by petition for certiorari is a matter of discretion for the Court and is not a matter of right. A petitioner is required to demonstrate compelling reasons to obtain review by petition for certiorari. The enumerated grounds include: (1) decisions in conflict with the federal courts of appeal; (2) a state court of last resort has improperly decided an important federal question; (3) a state or federal court has decided a federal question which needs to be settled by this Court. None of these grounds are satisfied in this case, as it involves questions of Connecticut law. In addition, no arguments were ever advanced in the trial court which addressed any federal questions.

The Connecticut Supreme Court declined to exercise its discretion to review the Appellate Court's decision, which is a clear indication that Reyad's arguments are without merit. The issues involved in this case are

purely matters of substantive and procedural Connecticut law. Reyad never raised any questions of federal law during the trial of this case, and the lengthy bench opinion addresses all of the arguments which were advanced by the Petitioner, including but not limited to standing.

## STATEMENT OF THE CASE

The Connecticut Superior Court entered a judgment in favor of the Respondent, Bank of New York, Trustee [BNY], on January 21, 2005, after a hearing in damages. Petitioner, Mostafa Reyad, d/b/a National Funding ["Reyad"], was defaulted for his failure to comply with discovery requests issued by BNY. Reyad failed to file a timely notice of defenses within 10 days of the entry of the default, as required under Connecticut Practice Book Section 17- 35(b). At the hearing in damages, the Defendant-Appellant offered no evidence regarding damages or challenging damages, although he had the right to do so. [Transcript of October 26, 2004, p.79].

On August 15, 2006, the Connecticut Appellate Court affirmed the trial court judgment, as reported in 97 Conn. App. 133 (2006). Reyad filed a Motion for Reconsideration, En Banc, dated August 15, 2006, which was denied by the Connecticut Appellate Court on September 6, 2006. A Petition for Certification was filed by the Defendant-Appellant, Mostafa Reyad, according to date stamp of September 14, 2006, which was denied by the Connecticut Supreme Court. Therefore, all state law procedural avenues were unsuccessfully explored by Reyad, including a motion to stay enforcement of the judgment after the Connecticut Supreme Court denied the Petition for Certification.

## SUMMARY OF THE ARGUMENT

I. Background of Petitioner's Business as Relates to Case.

II. Factual Background and Findings of Trial Court.

III. Legal Basis for State Court Decision.

## THE ARGUMENT

### I. BACKGROUND OF PETITIONER'S BUSINESS AS RELATES TO CASE.

Reyad operated a series of mortgage companies under various trade names in Connecticut, including National Funding. Reyad utilized third party funds to close mortgage loan transactions, under which he earned yield spread premiums and various commissions. All of the loans closed by Reyad were immediately sold, so Reyad effectively held no mortgage loans and did not fund any of the mortgage loans from which he earned commissions. The Connecticut District Court, in a separate case, has made findings of fact and conclusions of law that Reyad converted or misappropriated money under certain warehouse lines of credit, which findings are the basis of a federal court judgment against Reyad for a separate violation of the Connecticut unfair trade practices act. IndyMac v. Reyad, 2006 U.S. Dist. Conn. Lexis 55272. Reyad, as a licensee under Connecticut law as a non-depository first and second mortgage lender under CGS 36a-488, has a non-delegable duty to comply with Connecticut and federal law. Cornelius v. Department of Banking, 94 Conn. App. 547 (2006).

## II. FACTUAL BACKGROUND AND FINDINGS OF TRIAL COURT.

Plaintiff-Appellee, Bank of New York, Trustee ("BNY"), commenced this action for negligence and an unfair trade practice by Writ, Summons and Complaint dated August 1, 2000 against the Defendants Mostafa Reyad, National Funding, National Funding Mortgage Banker, Mostafa Reyad & Companies, ("Reyad Defendants"), for damages in connection with the origination of two mortgage loans in the original principal amount of $1.65 million dated August 31, 1998 to Eugene Chimblo, ostensibly secured by certain real property known as 993 Lake Avenue, Greenwich, Connecticut ("premises"). Counsel filed an appearance for the Reyad Defendants at the inception of the action. On or about July 23, 2002, in response to a request to revise filed by a defendant, BNY filed a Revised Complaint, and an Answer was filed by the Reyad Defendants dated August 16, 2002, which Answer admitted that the loan officer in these transactions was an employee of Reyad.

BNY served discovery requests upon the Reyad in September, 2003. Reyad failed to comply with the discovery requests. BNY filed a motion for compliance (#154.00) on December 3, 2002, which was granted by the Court, and compliance was ordered. No such compliance occurred, and BNY proceeded to file a Motion for Default dated February 9, 2004, which was granted by the Court on May 6, 2004. Notice of the default was is-

sued by the clerk on May 6, 2004. On or about May 13, 2004, Defendant-Reyad filed a Motion to Reopen the default, which Motion was scheduled for oral argument before the Court on July 12, 2004.

After oral argument, the trial court denied Reyad's Motion to Reopen, and the case was assigned to a hearing in damages. On or about July 20, 2004, the Defendant, Reyad, filed a notice of defenses. The notice of defenses were untimely under P.B. Section 17-35 (b), in that it was not filed within 10 days of the order from the clerk that the default was granted, which was May 6, 2004. Accordingly, based upon the absence of a timely disclosure of defense, Reyad was precluded from challenging any aspects of liability in this case. In addition, Reyad failed to disclose any experts on liability or damages at any time during the pendency of the case.

At the hearing in damages on October 26, 2004, Reyad offered no evidence to challenge damages. Reyad offered no expert or other testimony on the value of the collateral, nor did he offer any evidence to challenge the amount of the claimed damages. The following exchange occurred on the record with the Defendant-Reyad (transcript of October 26, 2004, p. 79):

> The Court: Do you wish to put on any case ?
>
> Mr. Reyad: in evidence ?
>
> The Court: With regard to damages.
>
> Mr. Reyad: For the damage. No evidence for the damage.
>
> The Court: Okay, sir. Thank you.

BNY asked the Court to take judicial notice of the mortgage foreclosure action, under which title vested on February 1, 2002 and a deficiency judgment entered on June 16, 2003 for $448,726.50 (Plaintiff's exhibit "4"). The trial court took judicial notice of these findings from the mortgage foreclosure action. BNY introduced evidence that a loan officer for the Respondent permitted an appraisal, prepared for the seller of the premises, to be "re-certified" to the Respondent as the appraisal which valued the collateral for the loan transaction. (Plaintiff's exhibit 1). The appraisal report, prepared by Gary Olcha, indicated a value of $2.75 million. Plaintiff, in a separate action, obtained a judgment against that appraiser, which judgment was admitted into evidence based upon a finding of judicial notice (p. 76, transcript of 10/26/04).

BNY offered testimony from its expert that the loan to value ratio for the subject transaction was about 120%, not the 60% loan to value ratio as required under the loan program at issue. The evidence showed at the time of the loan origination that the reported 55 - 60% loan to value ratios by the Reyad Defendants in the commitment letter and the Uniform Underwriting Transmittal Summary were false. (Plaintiff's exhibits 7 and 8). The Plaintiff's expert further testified that he had appraised the subject property on a number of occasions and was familiar with the Greenwich real estate market. Valuation testimony was offered both from the time of the origination of the loan in 1998 and on the date title

vested in the foreclosure of the mortgage on February 1, 2002.

The evidence demonstrated that the value of the property at the time of the origination of the loan was $1.25 million, not the $2.75 million as set forth by the Respondent in the Uniform Underwriting Transmittal Summary (Plaintiff's exhibit "8"). The trial court further found that the Respondent possessed information regarding large disparities in the collateral value- an auction price of $875,000 and an appraisal at $2.75 million- yet they proceeded to process the loan documentation and close the loan transaction with funds from a third party, then selling the loan documents to the Plaintiff.

The trial court specifically addressed the issue of standing in that it held that Reyad's assertion that he had no dealings with BNY was directly contradicted by his very own testimony in the mortgage foreclosure action, in which he testified that he authorized the assignment of the loan documents to BNY.

The trial court entered damages against the Respondent for the amount of the deficiency judgment, plus an award under the Connecticut Unfair Trade Practices Act for punitive damages equal to the deficiency judgment, for a total award of $897,453. In short, the trial court found that Reyad, acting through his loan officer, engaged in deceptive conduct to earn a commission by obtaining an inaccurate appraisal and by failing to alert the funds provider to information within its possession

regarding the inflated valuation. This evidence formed the basis of a finding that an unfair trade practice occurred.

Mortgage fraud perpetuated by mortgage brokers has become a national epidemic. Alarmingly, the FBI's 2005 Financial Institutions Report concludes that 80 per cent of all mortgage fraud involves "industry insiders" [i.e. appraisers, mortgage brokers, closing agents]. This Court may take judicial notice of HR 1295, currently pending before Congress, which is designed to address the national mortgage fraud epidemic.

## III. LEGAL BASIS FOR STATE COURT DECISION.

The Connecticut Superior and Appellate Courts decided this case consistent with prior Connecticut case precedent, that the failure to file a timely notice of defenses constitutes a waiver of any defense to liability under Connecticut law. Schwartz v. Milazzo, 84 Conn. App. 175 (2004).

"A default admits the material facts that constitute a cause of action . . . and entry of default, when appropriately made, conclusively determines the liability of a defendant." (Internal quotation marks omitted.) Schwartz v. Milazzo, 84 Conn. App. 175, 178, cert. denied, 271 Conn. 942, (2004). The defaulted party may challenge the allegations of a complaint only if it files a notice of defenses within ten days of notice of the default, which the defendants here failed to do. See General Statutes § 52-221 (a); Practice Book §§ 17-34, 17-35; Catalina v. Nicolelli, 90 Conn. App. 219, 222-24, (2005).

Defendant-Appellant has cited no public policy which is greater than the protection of the public by deterring licensees from misbehavior in the mortgage loan origination process. In addition, loans tainted with fraud are properly the subject of breach of contract and other claims against loan originators. Mario Valentin v. Community Remodeling Co., 90 Conn. App. 255 (2005). Any possible doubt about the good faith of Reyad may be quickly dispelled by a federal court judgment in a separate case, which entered punitive damages against him for intentional misconduct in abusing warehouse lending monies which were to fund mortgage loans. IndyMac v.

Reyad, 2006 U.S. Dist. Conn. Lexis 55272. According to well-established Connecticut law, a plaintiff who challenges the constitutionality of a statute must prove that the statute has adversely affected a constitutionally protected right "under the facts of his particular case and not merely under some possible or hypothetical set of facts not proven to exist." Hardware Mutual Casualty Co. v. Premo, 153 Conn. 465, 471, (1966); State v. Cuvelier, 175 Conn. 100, 111-12, (1978); Gentile v. Altermatt, 169 Conn. 267, 307, (1975), appeal dismissed, 423 U.S. 1041, 96 S. Ct. 763, 46 L. Ed. 2d 631 (1976); Kellems v. Brown, 163 Conn. 478, 483, appeal dismissed, 409 U.S. 1099, 93 S. Ct. 911, 34 L. Ed. 2d 678 (1972); Adams v. Rubinow, 157 Conn. 150, 152-53 (1968). Furthermore, a person contesting a statute's constitutionality has a heavy burden to establish its invalidity beyond a reasonable doubt. Weil v. Miller, 185 Conn. 495, 501-502 (Conn. 1981) In this case, Reyad never challenged the constitutionality of CGS 52-221(a) prior to the instant petition, nor has he identified how the statute has adversely affected a constitutionally protected right. The simple reality is Reyad failed to follow Connecticut procedure, yet he was still afforded notice of a hearing to open the default, and a separate hearing, with appropriate notice, on the issue of damages.

Finally, Reyad testified in the mortgage foreclosure that he specifically authorized the assignment of the subject loans to the Respondent. The trial court in the

instant case noted that his protestations and testimony to the contrary were totally lacking in credibility. Ample of evidence of standing exists, as more fully set forth in the trial court opinion, which is incorporated by reference.

## CONCLUSION

WHEREFORE, the Objection to the Petition for Certioari should be sustained.

The Respondent, Bank of New York, Trustee

By _____
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**CERTIFICATION**

I hereby certify that a copy of this pleading was mailed by us mail, postage prepaid, on this 2nd day of February, 2007, to the following counsel and pro se parties of record:

Mostafa Reyad
777 Summer Street
Stamford, CT 06905

Geoffrey K. Milne

Supreme Court, U.S.
FILED
FEB - 8 2007
OFFICE OF THE CLERK

**UNITED STATES SUPREME COURT**
**06-921**

**MOSTAFA REYAD**
**PETITIONER**

**V.**

**BANK OF NEW YORK, TRUSTEE,**
**RESPONDENT**

# PETITIONER'S REPLY

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**RE: QUESTION PRESENTED FOR REVIEW**

Contrary to the facts, records of the case, and Petitioner's Petition, Respondent Bank of New York, Trustee "BNY", objects to Petitioner's question presented for review stating incorrectly regarding the constitutionality of CGS 52-221(a) was never raised in the trial court, and according to Respondent it cannot form the basis of the Petition. As Petitioner stated in this Court, Petitioner had raised, Respondent's lack standing pursuant to Article III of the United States Constitution on January 27, 2004 (Doc # 161), supported by this Court authority of *Ruhrgas* 526 U.S. 574(1999), and *Steel Co.* 533 U.S. 83 (1998), and attached a printout of *Ruhrgas* case to Petitioner's motion. The trial court did not rule on the said motion. The trial court Judge stated that *Ruhrgas* and *Steel Co.* is not helping Petitioner because it is not Connecticut authority, and denied to hear any defense at oral argument, and ordered default. *See*, "Defendant's trial memorandum" dated November 12, 2004 at p. 3 stipulates Conn. Practice Book Sec. 17-34, that section is a dictation of Conn. Gen. Stat. 52-221(a). Petitioner supported his defense by the authority of *DeBlasio v. Aetna Life & Casualty Co.* 186 Conn. 398, 401, 441 A. 2d 838 (1982). Thus, Petitioner has raised the issue of Article III, at pretrial, at trial and on Appeal including the defense against 52-221(a).

**RE: BASIS FOR JURISDICTION**

Respondent's brief misleadingly stating that "no arguments were ever advanced in the trial court

which addressed any federal questions", *see* (Doc # 161), supra. The records show that neither the trial court nor the Appellate Court have discussed the issue of standing in any respect, except stipulating that Petitioner had raised the standing issues.

**RE: BACKGROUND OF PETITIONER'S BUSINESS AS RELATES TO THE CASE**

Respondent incorrectly stating that, "the Connecticut District Court in a separate case has made findings of fact and conclusion of law that Reyad converted or misappropriated money under certain warehouse lines of credit". That case does not have this stipulation, currently, it is under consideration for lack of evidence for more than two years after trial, and no final decision has issued.

**RE: FACTUAL BACKGROUND AND FINDINGS OF TRIAL COURT**

Respondent falsely stating "in response to a request to revise filed by a defendant, BNY filed a revised complaint". It is correct that the counsel who represented Petitioner in the beginning of the case has filed an answer, without Petitioner's knowledge, but Petitioner has never filed a request to revise, however, a request to revise is not equivalent, and does not constitute a request to amend.

Indeed, Respondent is correct in his statement, that Petitioner did not offer expert witness or other testimony on the value of the collateral, because the value of the collateral had determined by the appaiser

and reviewed and approved by IndyMac, Inc. the buyer and the provider of the fund *see* the Petition Exhibits # 5 and # 6, and Respondent has been awarded the amount $ 526,875.00 from the appraiser in the separate action *Bank of New York v. Gary Olcha* (Docket # CV-00-037588), moreover, Respondent has been awarded $ 448,726.50 in a third separate action for the same alleged cause of action against the mortgagor, *Bank of New York v. Eugene Chimblo* (Docket # x01-CV-99-0163131). Thus the entire findings of the court was for damage related to the value, that value determined by the appraiser and approved by the buyer and the provider of the funds after it was reviewed by IndyMac, Inc. senior management team and their own appraiser, provided that Respondent's expert witness was attacking only the methodology of performing the appraisal task reported by the appraiser Gary Olcha. Neither, Olcha, Chimblo nor IndyMac, Inc.'s underwriter Roxanne Lerma were before the Court. Petitioner did not value the collateral to be $ 2.75 million, Petitioner was a mortgage banker, not an appraiser, did his work professionally and verified the contents of the informations on the appraisal report, which is accurate. Petitioner is not in the position to discuss the methodology of the appraiser's performance. IndyMac, Inc.'s appraiser did that task as well as IndyMac, Inc.'s senior management team, and Petitioner followed their determination of value, see Petition Exhibits # 5 and # 6. Thus, Respondent's claim that the Uniform Underwriting Transmittal Summary were false,is incorrect statement, and if it is false, it lies on the entities who supplied Petitioner by

the information.

Petitioner's issue of standing relates to the three elements of the irreducible constitutional minimum of standing pursuant to *Lujan*, 504 U.S. 555, 560-61 never discussed by the trial court nor the Appellate Court, and it is now clear that, Respondent is refraining from discussing it.

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